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安全理事会

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2005 年 6 月 24 日秘书长给安全理事会主席的信

继我关于审查 1999 年东帝汶境内严重侵犯人权行为起诉情况独立专家委员会一事给安全理事会主席的信（S/2005/96 和 S/2005/104）之后，谨随函向你提交该委员会的最后报告摘要（附件一）以及报告全文* （附件二）。

该报告全面分析了有关的司法程序，并包括了一些内容非常广泛的建议，值得安理会认真审议。我特别希望提请安理会注意委员会的建议，即在秘书长和安全理事会有机会审查本报告所提建议之前，暂时保留重罪股、特别小组和辩护律师以及在被控犯重罪者的调查、起诉和公诉完成之前，确保重罪股、特别小组和辩护律师组工作的连续性。

安全理事会在第 1543(2004)和 1573(2004)号决议中决定，重罪股将与东帝汶支助团一起同时于 2005 年 5 月 20 停止活动。接管东帝汶支助团的联合国东帝汶办事处没有继续或支持重罪工作的授权。我已于 2005 年 5 月 12 日通报安理会（S/2005/310，第 19 段），表示保留了重罪股的 10 名工作人员，直到 2005 年 6 月 20，以便依照安理会第 1599（2005）号决议第 9 段的要求，使联合国秘书处能够保存一份重罪股汇编的全部记录的完整印本。其中 7 名工作人员的合同已延长至 6 月 30 日。

在这方面，我要向你通报，目前尚有几项上诉有待处理，将需要联合国提供援助，以便使这些审判结案。然而，在这方面必须采取的任何行动将需要安全理事会作出决定，因为联合国东帝汶办事处除了保存记录外，没有继续进行重罪股活动的授权。

有鉴上述，我因此请安全理事会尽早审议专家委员会的报告及报告中的建议。

我又向你通报，我已向印度尼西亚政府和东帝汶政府提供了委员会的报告。

请提请安全理事会成员注意本信及其附件为荷。

科菲·安南（签名）

* 报告全文只按原件分发。

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附件一

［原件：英文］

审查1999年东帝汶境内严重侵犯人权行为起诉情况专家委员会给秘书长的报告摘要

1. 安全理事会要求秘书长向安理会汇报在起诉 1999 年东帝汶境内严重违反国际人道法和严重侵犯人权行为的事态发展。秘书长遵照这项要求于 2005 年 2 月 18 日任命了一个专家委员会。专家委员会由巴格瓦蒂法官(印度)、沙伊斯塔•沙米姆博士(斐济)和横田洋三教授(日本)组成，受命在三个月内向秘书长提出报告。

2. 根据职权范围，专家委员会负责：

(a) 审查设在雅加达的印度尼西亚东帝汶问题特设人权法院及设在帝力的重罪股和重罪问题特别小组各项工作的司法程序；

(b) 评估这两个机构的有效运作情况；

(c) 查明这两个机构遇到的阻碍和困难；

(d) 评价这两个机构有多大能力伸张正义和追究东帝汶境内所犯罪行的责任；

(e) 考虑和建议法律上站得住脚、实践中切实可行的措施，期能追究负责人的责任，为受害者和东帝汶人民伸张正义，并促进和解；

(f) 考虑如何能够使分析有助于印度尼西亚和东帝汶两国政府商定要设立的真相与友谊委员会，并在这方面向秘书长提出适当建议。

3. 为编写其报告，专家委员会汇集和分析了大量第一手资料，例如法律、起诉书、判决书、案情摘要和审讯记录等，收到了印度尼西亚和东帝汶境内多个机构和个人对详细问题单的答复并研究了联合国审讯观察员和一些非政府组织提出的意见。委员会对东帝汶作了实况调查，会见了该国总统、国家及地方政府官员、司法机关成员、联合国东帝汶支助团（东帝汶支助团）工作人员、受害者团体和一些非政府组织。2005 年 5 月 11 日，委员会收到了 2005 年 5 月 18 日至 20 日访问雅加达的邀请。于是，委员会在 2005 年 5 月 18、19 和 20 日访问了雅加达。

4. 专家委员会于 2005 年 5 月 26 日向联合国人权事务高级专员办事处提交了报告。报告介绍了委员会的职权范围和工作方法，说明了相关原则和国际标准，并从历史沿革的角度概述了 1999 年的事件及在雅加达和帝力设立司法程序的情况。报告全面分析了这两个司法程序，陈述了涉及委员会职权范围的调查结果。委员

会研究了现有司法措施和机制，提出了关于确保为东帝汶人民伸张正义和追究责任的最可行机制的建议。委员会的调查结果和建议将在下文简要阐述。

重罪股、重罪问题特别小组和辩护律师股（东帝汶）

5. 重罪股和重罪问题特别小组（特别小组）2000 年由联合国东帝汶过渡行政当局（东帝汶过渡当局）设立，负责实施与危害人类罪行和东帝汶境内其他严重罪行有关的调查、起诉和司法程序。辩护律师股于 2002 年由联合国东帝汶支助团设立。重罪股在法律上隶属东帝汶总检察长办公厅。特别小组设在帝力县法院内，由两名国际法官和一名东帝汶法官组成。

6. 依照安全理事会 2004 年 5 月 14 日第 1543（2004）号和 2004 年 11 月 16 日第 1573（2004）号决议，重罪股于 2004 年 11 月完成所有调查。重罪股的任期将于 2005 年 5 月 20 日正式结束。安理会强调，联合国秘书处有必要在征得东帝汶当局同意的情况下，保留重罪股收集的所有记录的副本。

7. 自 2000 年开始工作以来，重罪股已向特别小组提交 95 份起诉书，起诉 391 人。在本报告完成之时，仍有 339 名被告人在东帝汶司法辖区之外逃逸，对他们的指控尚未落实。其中包括印度尼西亚前国防部长兼印度尼西亚武装部队司令维兰托、国防军六名高职衔指挥官以及前东帝汶总督。截至目前，特别小组已发出 284 份逮捕令。对维兰托的逮捕令仍在东帝汶总检察长手中，后者并未将其转交国际刑警组织。

8. 专家委员会发现，东帝汶重罪程序已保证在相当程度上追究应对 1999 年所犯罪行负责的人员的责任。重罪股的调查和起诉大体上符合国际标准。特别小组为受害者和证人提供了一个有效的举证场所。判决书的数量和部分判决书的质量也表明，特别小组有能力在短短的工作时间内为 1999 年的事实和事件作一个准确的历史记录。总体而言，特别小组的决定有助于为今后处理重罪的其他县级法院确立清晰的判例和实践。此外，特别小组还适时地从其他国际刑事法庭的法律出发，编写了它们自己的判例。重罪程序还大大有助于加强对东帝汶法治的尊重，有利于社区参与和解和伸张正义进程。存在类似特别小组这样的有效和可信的司法程序，也阻止了私底下的冤冤相报和打击报复。

9. 但是，东帝汶人民对司法程序无力依法惩处国家司法辖区之外的人，尤其是高级别被起诉人而感到沮丧，对特别小组宣判的罪犯绝大多数来自东帝汶也表示关切。

10. 专家委员会的结论是，重罪程序仍无法全面追究应对 1999 年东帝汶境内严重侵犯人权行为负有最大责任的人员的责任。这可能有多个原因。

11. 专家委员会发现，重罪股、特别小组和辩护律师股缺少充足资源来满足各自任务的最低需要。在这方面，委员会结合东帝汶的具体情况，研究了其他国际化和国际国内混合刑事法庭的现有供资水平。

12. 专家委员会发现，总检察长办公厅目前没有摆脱东帝汶政府而独立运作。关于这一点，起诉维兰托及其同伙一案中对逮捕令的处理就足以说明。

13. 专家委员会发现，无法在印度尼西亚境内取证和接触嫌疑人，是阻碍东帝汶重罪程序取得进展的一个重大挑战。它注意到，印度尼西亚和东帝汶之间目前没有引渡协定或任何其他形式可逮捕和移交目前在逃被起诉人的有效双边法律援助框架。在当前政治气氛中，印度尼西亚政府和东帝汶政府可能不太愿意作出此类安排。

东帝汶问题特设人权法院（印度尼西亚）

14. 东帝汶问题特设人权法院（特设法院）是依法设立的，负责除其他外审判应对 1999 年 4 月至 9 月期间东帝汶境内所犯危害人类罪行负责的个人。

15. 专家委员会发现，东帝汶境内侵犯人权行为调查委员会（调查委员会）依照“预备起诉”的调查的国际标准，以全面、可信和客观的方式完成了特设司法程序的调查阶段。调查委员会编写的结果报告较为详细地为相关犯罪基础、关联证据和军民机关对个人涉嫌的指称提供了文件证明。调查委员会的报告已转交总检察长作进一步调查，并将酌情向特设法院提起诉讼。

16. 在大约 22 名嫌疑人中，总检察长起诉了重要时刻在东帝汶直接指挥的 18 名军人和警察，以及两名文职政府官员和一个民兵头领。被指控的高职衔官员是东帝汶的一个军区司令。总检察长拒绝起诉调查委员会报告中列出的其他高职衔嫌疑人。对 18 个被告的审判都已结束，除一人外，所有被告都在审判时或在上诉后无罪释放。

17. 专家委员会在透彻分析现有事实的基础上得出结论，向特设法院提起的诉讼明显不合格，主要原因是起诉方没有奉献精神，以及因为缺少在案情诉讼方面的专门知识、经验和培训，调查有缺漏，审判时对定罪材料的展示不恰当等。例如，委员会发现起诉书中对被告案情的陈述太受限制，没有用必要的实质性材料加以证实。起诉方证人的遴选也令人不满意。在这些审判中作证的起诉方证人大多是被起诉人、隶属印尼国防军的个人和政府官员。起诉方没有实质性地利用调查委员会及重罪股调查员收集的现有文件证据和证人陈述。值得注意的是，在开展调查和提起诉讼时，明显缺乏起诉被告的政治意愿，也缺少对这些调查的物质和精神支持。

18. 专家委员会还研究了特设法院法官的表现和举止。委员会发现，法庭的气氛无法让公众相信这是一个可信的司法场所。保护受害人/证人的设施及立法措施

都不合格，特别是对来自东帝汶的受害人/证人的保护。委员会还全面审阅了判决书。它发现，特设法院的裁定与事实裁定不一致，其直接原因包括：运用了有分歧的司法手段、对同一案情作出不同的法律解释、不愿意或不打算使用国际判例和实践、以及在分析评估事实和法律方面不娴熟等。

19. 专家委员会发现，特设法院的司法程序不能有效地为严重侵犯人权行为的受害人和东帝汶人民伸张正义。调查和起诉被告的方式不可信，无法追究严重侵犯行为最大责任人的责任。特设司法程序的许多方面都显示没有遵守或按照相关的国际标准。

真相与友谊委员会

20. 专家委员会发现，真相与友谊委员会的有些职权不符合关于绝不姑息重罪的国际标准，有些职权需要作澄清和重新评估。委员会还发现，缺少一个能迫使证人向真相与友谊委员会说出真相的机制。不过，其他职权中关于和解和提供补偿的精神，为印度尼西亚和东帝汶之间恢复关系提供了适当的渠道。

有关东帝汶的建议

21. 在提出与重罪程序有关的建议时，专家委员会认为，没有国际参与，期望东帝汶诉讼机关、特别小组和辩护律师在可以预见的将来依照国际标准进行重罪调查、起诉、判决和辩护是不切实际的。

22. 专家委员会促请安全理事会保证在秘书长和安全理事会有机会审查本报告所提建议之前，暂时保留重罪股、特别小组和辩护律师股。委员会还建议安全理事会在被控犯重罪者的调查、起诉和公诉完成之前，确保重罪股、特别小组和辩护律师股工作的连续性。

23. 作为替换，如果上述建议不被采纳，专家委员会则强烈建议联合国设立一个机制，继续完成对严重侵犯人权行为的调查和起诉工作。委员会尤其建议，这样一个机制能使东帝汶政府保留对司法程序的主权，有利于机构能力建设，而且还为国际社会酌情协助司法程序提供了渠道。

有关印度尼西亚的建议

24. 专家委员会建议印度尼西亚通过组建一个由国际司法和法律专家组成的小组加强司法和诉讼能力，小组成员最好来自亚洲，由印度尼西亚政府在秘书长的建议下任命，并明确小组的责任是在国际刑法、国际人道法和国际人权标准、包括程序和取证标准方面向总检察长办公室提供独立的专业法律咨询。

25. 专家委员会建议总检察长办公厅全面审阅向特设法院提起的诉讼，并酌情在印度尼西亚法律现有依据的基础上重新提起诉讼。如果合适，委员会建议重新进行审判，依照可接受的国家和国际标准重新审判被起诉人。

26. 专家委员会建议，应由重罪股工作人员和（或）联合国任命的其他人员组成一个委任团，提供严格的监督、指导和协助，将涉及起诉维兰托及另一些人的案件的相关证据和案卷移交给印度尼西亚总检察长，由总检察长开展调查和提起诉讼。委员会强调，这个备选方案必须与重罪股和（或）联合国委任团进行讨论，因为会有证人保护问题、保密问题和其他安全关切。委员会建议，这一备选方案的形式由有关各方决定。

27. 专家委员会建议要求印度尼西亚政府向秘书长提交一份关于它对重罪股起诉情况调查结果的全面报告，详细说明重罪股决定起诉或不起诉的原因，包括是否重新审判原先由特别法院审判过的任何个人。

28. 兹建议印度尼西亚政府应在秘书长作出决定之日起六个月内落实这些建议。

设立东帝汶问题国际刑事法庭

29. 如果东帝汶政府和印度尼西亚政府没有在建议的时间框架内启动上述与该两国有关的建议，或者安全理事会不采纳上述建议，专家委员会则建议安全理事会应按照《联合国宪章》第七章，通过关于在第三国设立东帝汶问题特设国际刑事法庭的决议。

利用国际刑事法院

30. 如果不采纳关于设立东帝汶问题国际刑事法庭的建议，安全理事会不妨考虑是否可以利用国际刑事法院作为调查和起诉东帝汶境内所犯严重罪行的机构。

行使普遍管辖权

31. 除上述建议外，专家委员会认为，联合国会员国不妨依照各自国家的法律，调查和起诉应对 1999 年在东帝汶境内所犯严重侵犯人权行为负责的人员。

附件二

审查1999年东帝汶境内严重侵犯人权行为起诉情况专家委员会给秘书长的报告

2005年5月26日

Annex II

Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999

26 May 2005

Contents

Glossary

Abbreviation used in Report	Full citation
Jurisprudence	
Aleksovski Appeal Judgement	*The Prosecutor v. Zlatko Aleksovski*, *Judgement*, Case No. IT-95-14/1-A, App. Ch., 24 March 2000
Blaskic Appeal Judgement	The Prosecutor v. Tihomir Blaskic, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004
Blaskic Trial Judgement	The Prosecutor v. Tihomir Blaskic, Judgement, Case No. IT-95-14-T, T. Ch. I, 3 March 2000
Brdanin Trial Judgement	The Prosecutor v. Radoslav *Brdanin, Judgement*, Case No. IT-99-36-T, T. Ch. II, 1 September 2004
Delalic Appeal Judgement	The Prosecutor v. Zejnil Delalic et al., Judgement, Case No. IT-96-21-A, App. Ch., 20 February 2001
Delalic Trial Judgement	The Prosecutor v. Zejnil Delalic et al, Judgement, Case No. IT-96-21-T, T. Ch. II, 16 November 1998
Krnojelac Appeal Judgement	The Prosecutor v. Milorad Krnojelac, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003
Krstic Appeal Judgement	The Prosecutor v. Radislav Krstic, Judgement, Case No. IT-98-33-A, App. Ch., 19 April 2003
Krstic Trial Judgement	The Prosecutor v. Radislav Krstic, Judgement, Case No. IT-98-33-T, T. Ch. I, 2 August 2001
Kordic Appeal Judgement	The Prosecutor v. Dario Kordic and Mario Cerkez, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004
Kordic Trial Judgement	The Prosecutor v. Dario Kordic and Mario Cerkez, Judgement, Case No. IT-95-14/2-T, T. Ch. III, 26 February 2001
Kayishema Trial Judgement	The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement and Sentence, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999
Semanza Trial Judgement	The Prosecutor v. Laurent Semanza, Judgement and Sentence, Case No. ICTR-97-20-T, T. Ch. III, 15 May 2003
Kunarac Appeal Judgement	The Prosecutor v. Dragoljub Kunarac et al., Judgement, Case No. IT-96-23 & IT-96-23/1-A, App. Ch., 12 June 2002
Kunarac Trial Judgement	The Prosecutor v. Dragoljub Kunarac et al., Judgement, Case No. IT-96-23-T & IT-96-23/1-T, T. Ch., 22 February 2001

Kupreskić Trial Judgement	The Prosecutor v. Zoran Kupreskić et al., Judgement, Case No. IT-95-16-T, T. Ch. II, 14 January 2000
Kupreskić Appeals Judgement	The Prosecutor v. Kupreskić, Case No. IT-95-16-A
Kvocka Appeal Judgement	The Prosecutor v. Miroslav Kvocka et al., Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005
Kvocka Trial Judgement	The Prosecutor v. Miroslav Kvocka et al., Judgement, Case No. IT-98-30/1-T, T. Ch. I, 2 November 2001
Tadic Appeal Judgement	The Prosecutor v Dusko Tadic, Judgement, Case No. IT-94-1-A, App. Ch., 15 July 1999
Tadic Trial Judgement	The Prosecutor v Dusko Tadic, Opinion and Judgement, Case No. IT-94-1-T, T. Ch., 7 May 1997

Other terms

Aitarak	Militia group operating in Timor-Leste
Bahasa Indonesia	Major dialect spoken in Indonesia
BAP	Investigation file (Berita Acara Pemeriksaan)
BMP	Militia group operating in Timor-Leste (Besih Merah Putih)
Brimob	Indonesian Paramilitary Police (Brigade Mobile)
Bupati	District head, Regent
CAVR	Commission on Reception, Truth and Reconciliation (Commissão de Acolhimento, Verdade e Reconciliação)
CTF	Commission of Truth and Friendship
Dandim	District Military Commander (Komandan Distrik Militer)
DPR	National Parliament of Indonesia (Dewan Perwakilan Rakyat)
Falintil	Armed Forces for the National Liberation of East Timor (Forças Armadas de Liberação National de Timor-Leste
Fretilin	East Timorese pro-independence group (Frente Revolucionaria de Timor-Leste Independente)
INTERFET	International Force in East Timor
Komnas HAM	Indonesian National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia)
Kopassus	Indonesian Military Special Forces (Komando Pasukan Khusus) often referred to colloquially as ‘beret merah’ or ‘red berets’
KPP HAM	Commission of Inquiry into Human Rights Violations in East Timor (Komisi Penyelidikan Pelanggaran Hak Asasi Manusia)
KUHAP	Indonesian Code of Criminal Procedure (Kitab Undang-undang Hukum Acara Pidana)
KUHP	Indonesian Code of Criminal Law (Kitab Undang-undang Hukum Pidara)
POLRI	Republic of Indonesia Police (Polisi Republik Indonesia)
PERPU	Indonesian Government Regulation no. 1 of 1999 on the Ad Hoc Court
PPI	Integration Fighting Force (Pasukan Perjuangan Integrasi)
MPR	People’s Consultative Assembly
SCJ	Superior Council of the Judiciary of Timor-Leste
Tetum	Major dialect spoken in East Timor
TNI	Indonesian National Military (Tentara Nasional Indonesia)
UNAMET	United Nations Mission in East Timor
UNOTIL	United Nations Office in Timor-Leste
UNTAET	United Nations Transitional Administration in East Timor

I. Introduction

A. Historical background

1. On 7 December 1975, Indonesia launched a naval, air and land invasion of a Portuguese colony, East Timor, which had been declared a non-self-governing territory within the meaning of Chapter XI of the United Nations Charter by the General Assembly.

2. On 17 July 1976, President Suharto of Indonesia promulgated Act 7/1976 providing for the integration of East Timor into Indonesia as its twenty-seventh province, but the United Nations declined to sanction the decision on the status of East Timor.

3. East Timor descended into an internal conflict primarily due to the resistance of pro-independence groups such as Fretilin (*Frente Revolucionaria de Timor Leste Independente*) to the Indonesian occupation and those who advocated integration with Indonesia. Extensive human rights violations amounting to serious crimes against humanity were committed by the Indonesian armed forces against pro-independence activists and their suspected supporters. Indonesia has acknowledged that the estimated number of those who died as a consequence of the conflict could be as high as 200,000 individuals.

4. The question of East Timor has remained on the agenda of the United Nations since the Indonesian invasion. Every year between 1976 and 1981, the General Assembly adopted resolutions reaffirming East Timor’s right to self-determination. In 1997, the Secretary-General appointed Ambassador Jamsheed Marker as his personal representative for East Timor. President Suharto was forced to leave office in May 1998; his departure opened the door for progress on the issue of Timorese self-determination. In January 1999, his successor, B.J. Habibie, declared willingness to allow the Timorese to choose between independence and autonomy within Indonesia. Indonesia concluded an agreement with the United Nations and Portugal on a “popular consultation” administered by the United Nations, in the form of a ballot to either accept or reject a proposal for autonomy. The United Nations was also actively involved in the consideration of security arrangements and made several proposals, which included the disarmament of all paramilitary and militia forces, a reduction in the presence of the Indonesian Armed Forces (TNI) and the presence of United Nations civilian police officers to advise the Indonesian police and to supervise the escort of ballot boxes to and from polling stations.

5. The Indonesians did not incorporate some of the United Nations proposals, proposing instead that the TNI and the Indonesian police maintain neutrality and that the police take sole responsibility for the maintenance of law and order. On 5 May 1999, representatives of the Governments of Indonesia and Portugal met in New York under the auspices of the United Nations, to agree to a constitutional framework for special autonomy for East Timor. The United Nations was a party to an

agreement on the modalities for the popular consultation and on security issues. The date of the ballot was set for 8 August 1999. The Security Council, by its resolution 1246 (1999) of 11 June 1999, established the United Nations Mission in East Timor (UNAMET) to enable the United Nations to effectively carry out the popular consultation.

6. By 6 August 1999, 444,666 people had registered at the polling stations. On 30 August 1999, 98 per cent of the registered voters participated in the polls. On 1 September 1999, Dili was racked with militia violence and killings, and two UNAMET staff members were slain in Maliana. At a public hearing, a United Nations-appointed Election Commission considered complaints by the pro-integrationists of irregularities and concluded that the overall ballot process was not impaired. On 4 September 1999, the results of the vote were announced in Dili: 21.5 per cent of voters favoured special autonomy while 78.5 percent voted against, thereby opting for full independence for East Timor. Thereafter, a campaign of violence ensued throughout the districts of East Timor, characterized by more than 1,400 killings, as well as acts of rape, looting, arson, forced deportations of civilians and property destruction, which led to the withdrawal and evacuation of UNAMET staff.

7. On 12 September 1999, Indonesia requested that the United Nations intervene to restore peace and security in East Timor. On 15 September 1999, the Security Council, by resolution 1264 (1999), authorized the establishment of a multinational force, the International Force in East Timor (INTERFET), and mandated it to restore security. On 19 October 1999, the Indonesian Parliament formally revoked the integration of East Timor and on 30 October 1999, the last Indonesian representatives left East Timor.

8. On 25 October 1999, the Security Council passed resolution 1272 (1999), establishing the United Nations Transitional Administration in East Timor (UNTAET). The Special Representative of the Secretary General and Transitional Administrator for East Timor then proceeded to promulgate a series of Regulations establishing a judicial process in East Timor. In June 2000, UNTAET established the Special Panels for Serious Crimes (Special Panels) within the Dili District Court, the Serious Crimes Unit (SCU) within the Office of the General Prosecutor and, subsequently, in September 2002, the Defence Lawyers Unit (DLU).

9. In November 1999, three thematic Special Rapporteurs visited East Timor and issued a joint report documenting evidence of the operational involvement of the TNI with militia groups implicated in the violence surrounding the Popular Consultation, and recommending the establishment of a commission of inquiry. The International Commission of Inquiry for East Timor submitted its report to the Secretary-General on 6 January 2000, recommending the establishment of an international human rights tribunal to try and to sentence perpetrators of serious violations of international human rights and international humanitarian law that took place in East Timor in 1999.

10. In response to the recommendations of the International Commission of Inquiry, and due to mounting pressure from the international community for Indonesia to try the perpetrators of the 1999 crimes, the Government of Indonesia acted to establish a judicial process in Jakarta. It authorized the National Commission on Human Rights (Komnas HAM) to institute an inquiry into the events in

1999. Subsequently, through a series of legislative acts and Presidential decrees, the Government of Indonesia set up the Ad Hoc Human Rights Court.

11. The Secretary-General accepted Indonesia's assurances, but stated that he would "closely monitor progress towards a credible response in accordance with international human rights principles."[1]

12. The judicial processes before the Ad Hoc Court in Indonesia and the Special Panels in Timor-Leste have raised serious concerns within the international community. In fulfilment of the request of the Security Council that the Secretary-General inform it of developments in the area of prosecution of serious violation of international humanitarian law and human rights in East Timor in 1999, a Commission of Experts was appointed on 18 February 2005 to assess the progress made in bringing to justice those responsible for such violations, to determine whether full accountability has been achieved and to recommend future actions as may be required to ensure accountability and promote reconciliation.

13. The members of the Commission of Experts appointed by the Secretary-General were Justice P. N. Bhagwati (India), and Dr. Shaista Shameem (Fiji) and Professor Yozo Yokota (Japan).

B. Mandate

14. The specific mandate of the Commission of Experts is established in its terms of reference:

- To review the judicial processes of the work of the Indonesian Ad Hoc Human Rights Court on East Timor and the Serious Crimes Unit and the Special Panels for Serious Crimes;

- To assess the effective functioning of those institutions, identify obstacles and difficulties encountered, and evaluate the extent to which they have been able to achieve justice and accountability for the crimes committed in East Timor; and

- To consider and recommend to the Secretary-General as necessary and appropriate, legally sound and practically feasible measures and/or mechanisms so that those responsible are held accountable, justice is secured for the victims and the people of Timor-Leste, and reconciliation is promoted.

15. The Commission of Experts was also requested to consider ways in which its analysis could be of assistance to the Commission of Truth and Friendship, which the Governments of Indonesia and Timor-Leste agreed to establish, and to make appropriate recommendations to the Secretary-General in this regard.

1 A/54/726-S/2000/59.

C. Time frame

16. The Commission of Experts was granted a period of three months to complete its work. The members of the Commission initially convened in Geneva from 21 to 23 February 2005 in order to establish a methodology and plan of work. The Commission conducted further consultations in New York from 31 March to 2 April 2005 and undertook a fact-finding mission to Timor-Leste from 5 to 10 April 2005 and to the Republic of Indonesia from 18 to 20 May 2005.

17. The Commission reconvened in Geneva to prepare its report and completed its work on 26 May 2005.

D. Cooperation

18. The terms of reference of the Commission of Experts provide:

> "1. In the conduct of its work, the Commission shall enjoy the full cooperation of the Governments of Indonesia and Timor-Leste. It shall be provided with the necessary facilities to enable it to discharge its mandate, and shall, in particular, be guaranteed:
>
> – Freedom of movement throughout Indonesia and Timor-Leste;
>
> – Free access to all relevant documents, including those in possession of investigative, prosecutorial and judicial institutions;
>
> – Freedom to meet and interview all persons in possession of information considered necessary by the Commission, in conditions of privacy and confidentiality of sensitive information;
>
> – Appropriate security arrangements by the Governments of Indonesia and Timor-Leste for personnel and documents of the Commission, without restricting its freedom of movement
>
> "2. The Governments of Indonesia and Timor-Leste shall accord privileges, immunities and facilities necessary for the independent conduct of the work of the Commission."

19. The Commission was afforded full and genuine cooperation by the Government of Timor-Leste, including an invitation to visit the country, freedom of movement, free access to relevant documents, freedom to meet and interview persons including senior government officials, and all other assistance requested. The Commission extends its gratitude to the Government of Timor-Leste for facilitating its work to the fullest extent possible.

20. The Commission is also grateful for the full cooperation, extensive assistance and support received from UNMISET, particularly its Human Rights Unit, as well as from the United Nations Development Programme (UNDP) in Jakarta and several individuals involved in the judicial process before the Special Panels. The Commission also acknowledges the opportunity to informally meet with the Ambassador and Permanent Representative of the Republic of Indonesia to the United Nations in Geneva on 22 February 2005 to discuss the terms of reference of the Commission.

21. On 15 May 2005, the Commission of Experts received an invitation to visit the Republic of Indonesia from 18 to 20 May, and visited on 18, 19 and 20 May 2005. The Commission is grateful for the invitation and acknowledges the full cooperation it has received from the officials of the Government of Indonesia.

22. Throughout March and April 2005, the Commission also transmitted a number of requests for information to various Government bodies and other individuals involved in the judicial process before the Ad Hoc Court. The Commission notes with gratitude the cooperation of Komnas HAM, Institute for Policy Research and Advocacy (ELSAM) and members of Indonesian non-governmental organizations (NGOs).

E. Consultations and missions

23. The Commission conducted consultations with the Secretary-General and other United Nations officials in New York from 30 March to 1 April 2005. The Commission also consulted with the Core Group (comprising representatives of Brazil, New Zealand, Australia, United Kingdom, United States of America, Portugal and Japan). The Commission also met with several NGOs and with Mr. Ian Martin, the former Special Representative of the Secretary-General for UNAMET.

24. The Commission conducted a mission to Timor-Leste from 5 to 10 April 2005, convening several meetings with the Special Representative of the Secretary-General of UNMISET and his senior staff; officers from the Human Rights Unit (HRU); the General Prosecutor, the Deputy General Prosecutor for Serious Crimes and his staff from the Serious Crimes Unit SCU; the President of the Appeals Court; the Judge Coordinator and Judges of the Special Panels; and the administrative and support staff of the Special Panels for Serious Crimes. At the request of the Commission, a briefing was organized by the Commissioners and staff of the Commission for Reception, Truth and Reconciliation (CAVR).

25. The Commission travelled to Maliana in the Bobonoro district, where serious crimes had been committed against the civilian population and two UNAMET staff members had been killed. In Maliana, the Commission held discussions with widows of Timorese men who were killed in 1999, as well as with victims and families of the victims in Dili. A member of the Commission also convened a private meeting for victims of sexual and gender-based violence and women who had lost their husbands and family members.

26. In addition, the Commission also obtained information relevant to the damage inflicted against United Nations interests during the events of 1999 and in particular, the murders and threats to the lives of United Nations staff members, whether locally recruited Timorese or international staff.

27. During the Commission's visit to Jakarta, the Commission met with a number of Government officials and members of Cabinet, including the President of the Republic of Indonesia, Minister for Foreign Affairs, the Commander-in-Chief of the Indonesian National Defence Force, Minister for Law and Human Rights, the Attorney-General and Public Prosecutors, Members of Commission I (House of Representatives) and the Chief Justice. All these meetings were organized by the Government of Indonesia, and the Commission was afforded an opportunity to discuss issues relevant to its mandate. The discussions were open and frank and the Commission received whatever information requested during the three-day mission.

F. Methodology

28. According to its terms of reference, the Commission is required to conduct its work in an impartial and independent manner in accordance with international standards. These principles have directed the working methods of the Commission in its interaction with Governments, international organizations, NGOs and individuals.

29. In its analysis, for primary source material, the Commission has relied predominantly on materials pertaining to the investigation, prosecution and trial proceedings of the two judicial processes under review, including indictments, judgements and trial transcripts. Where appropriate, the Commission conducted personal interviews, obtained written responses to specific questions set out in questionnaires[2] and requested information from intergovernmental organizations, NGOs and national authorities. The Commission received a number of personal letters and unsolicited submissions. The Commission has also made reference to numerous reports prepared by NGOs, United Nations and other trial observers, and progress reports by trial monitoring bodies. A number of these reports have been of invaluable assistance to the Commission.

G. International principles on the independence and accountability of judges, prosecutors and lawyers

30. In determining whether substantive and procedural aspects of the two judicial processes satisfy international standards, the Commission has given due consideration to the domestic legal infrastructure of both Indonesia and Timor-Leste, and has referred to the following principal international sources:

[2] See annex A for a compilation of selected questionnaires the Commission has prepared for the Indonesian and Timor-Leste authorities and other individuals.

- Relevant international human rights norms; [3]

- Specific international standards on the role of judges,[4] prosecutors[5] and lawyers;[6]

- Specific international standards relevant to the rights of victims and witnesses;[7]

- Specific international standards relevant to accountability for serious violations of human rights;[8]

- The corpus of jurisprudence on substantive and procedural law of ad hoc tribunals, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Special Court for Sierra Leone, addressing, inter alia, the definitions of substantive elements of crimes and legal requirements of modes of liability as well as principles of *ne bis in idem* and right to a reasoned opinion; and

- The legal infrastructure of the International Criminal Court, including the Rome Statute, the Rules of Procedure and Evidence and Elements of Crimes, as well as the legal infrastructure of other internationalized criminal tribunals.

31. In order to assess the effective functioning of the two institutions in general, the Commission has given due consideration to the national legal infrastructure of both Indonesia and Timor-Leste, and has referred to the following principal sources:

- The indicia of success (Five Core Achievements) of the ad hoc Tribunal for the former Yugoslavia (ICTY), which include spearheading the shift from impunity to accountability, establishing a historical record of the conflict, bringing justice to victims and giving them a voice, and accomplishments in international law; and

- Relevant national standards, such as the Trial Court Performance Standards in the United States of America, which include access to justice; expediency in case processing and

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3 Inter alia, articles 9, 10 and 14 of the International Covenant on Civil and Political Rights, to which Timor-Leste is party but Indonesia is not, as well as relevant comments of the Human Rights Committee.

4 Inter alia, the Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct, as well as relevant regional standards such as the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA region.

5 Inter alia, the Guidelines on the Role of Prosecutors.

6 Inter alia, the Basic Principles on the Role of Lawyers.

7 Inter alia, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law , adopted by the Commission of Human Rights in its resolution 2005/35, and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

8 Inter alia, the updated Set of Principles for the protection and promotion of human rights through action to combat impunity.

timeliness in the implementation of new laws and procedures; equality; fairness and integrity; independence and accountability; and public trust and confidence.

32. Drawing on the sources described above, and cognizant of the particular context of the two judicial processes, the Commission has compiled a set of international principles to provide a framework for its analysis and deliberations.[9]

33. The Commission has considered the following international principles applicable to judges:

- *Principles of independence of the judiciary*, derived from the separation of powers, require that judges as officers of the judiciary should not be subordinate or accountable to other branches of Government; this includes *institutional* independence from other branches of Government as well as *individual* independence of judges from improper interference in deciding cases according to law, free from fear of reprisals;

- *Principles of impartiality* require an absence of bias, animosity or sympathy towards the parties. They require also that judges be free from preconceptions regarding the matter before them and do not act to promote the interests of one of the parties; and that cases should be decided on the basis of the facts and in accordance with the law;

- *Principles of financial autonomy and sufficient resources* require that the judiciary be adequately funded in order to discharge its functions, and should be consulted regarding the preparation of the judicial budget and its implementation;

- *Principles of respect for fundamental freedoms* recognize that judges enjoy the same fundamental freedoms as other citizens, provided they act in a manner to preserve the dignity of their office;

- Principles of *judicial appointment* require that judges be appointed on the basis of professional qualifications and through a transparent procedure, which guarantees that the judiciary possesses the requisite skills and independence;

- *Principles of security of tenure* guarantee and maintain judicial independence and require that the promotion of judges be based on objective factors such as ability, integrity and experience;

- *Principles of judicial accountability* require that judges conduct themselves according to ethical guidelines and, where available, established judicial codes of conduct. Judges should

[9] See International Commission of Jurists, "International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors", (ICJ, Geneva 2004), and the report of the independent expert to update the Set of Principles to combat impunity (E/CN.4/2005/102 and Add.1).

only be subject to disciplinary measures for reasons of incapacity or serious misconduct rendering them unfit to discharge their duties.

34. The Commission has also considered the following international principles applicable to prosecutors:

- *Principles of impartiality* and *objectivity* require autonomy and independence from other branches of government.[10] Prosecutors should carry out their functions in an impartial and objective manner, avoiding political, social, religious or any other kind of discrimination, free from bias, and ensuring due process and protection of human rights and the correct administration of justice;

- *Principles of qualification, selection and training* require that prosecutors should be individuals of integrity and ability, with appropriate training and qualifications. Their promotion should also respect objective criteria such as professional qualifications, ability and integrity; while disciplinary action against prosecutors should be based on law;

- *Principles of independence* require that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability, subject to reasonable conditions of service, adequate remuneration and, where applicable, tenure, pension and age of retirement;

- *Principles of effective prosecution* require that prosecutors play an active role in criminal proceedings, including in the decision to initiate prosecution and in the investigation of crimes if legislatively required, including supervision over the legality of these investigations, supervision of the execution of court decisions, and the exercise of other functions as representatives of the public interest. Prosecutors should also give due attention to prosecution of crimes committed by public officials, particularly corruption, abuse of power and grave violations of human rights, and should apply the law equally to all citizens, particularly those who hold official positions, and respect for the rights of suspects, victims and witnesses.

35. The Commission has also considered the following international principles applicable to lawyers in general, including defence counsel:

- *Principles of access to legal representation* require that all persons should have access to legal services provided by an independent legal professional and individual lawyers;

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[10] The Commission notes that in certain legal systems, prosecutors are either appointed by the executive branch or operate under a certain level of dependency upon the executive branch. Such a mode of appointment or operation may require prosecutors to observe certain directives emanating from the Government. In its analysis, the Commission considers the particular constitutional and legislative infrastructure of Timor-Leste and Indonesia.

– *Principles* of *independence* require that lawyers should be accorded protection from any unlawful interference with their work, and should be allowed to perform all professional functions without intimidation, hindrance, harassment or improper influence. They should be able to travel and consult their clients freely within their own country and abroad and be given timely access to appropriate information to provide effective legal assistance to their clients;

– *Principles of ethical conduct* require that lawyers discharge their professional functions according to ethical standards and require accountability for violations of applicable rules of professional conduct.

36. The Commission will now turn to examine the judicial processes in Timor- Leste and the Republic of Indonesia.

II. The serious crimes process (Timor-Leste)

A. Institutional and legal framework

37. By its resolution 1272 (1999) of 25 October 1999, the Security Council, acting under Chapter VII of the Charter, decided to establish UNTAET, which was empowered to exercise all legislative and executive authority in East Timor, including the administration of justice, with the mandate as described in the resolution.

38. The Serious Crimes Unit (SCU) was established by UNTAET and mandated to conduct investigations and prepare indictments against those responsible for crimes against humanity and other serious crimes committed in East Timor. The mandate of the SCU will end in May 2005, and all investigations were concluded in November 2004, in accordance with Security Council resolutions 1543 (2004) and 1573 (2004).

39. Since East Timor gained independence on 20 May 2002, the SCU has functioned under the legal authority of the General Prosecutor of Timor-Leste, Dr. Longuinhos Monteiro. The Office of the General Prosecutor is divided into two sections: Ordinary Crimes and the SCU, which is headed by the Deputy General Prosecutor for Serious Crimes, Mr. Carl DeFaria, who reports functionally to the General Prosecutor and is responsible for managing investigations and prosecutions of SCU. The SCU has seen one international General Prosecutor and three Deputy General Prosecutor for Serious Crimes, all international staff, since its inception.

40. Section 10.1 of UNTAET Regulation No. 2000/11 on the organization of courts in East Timor sets out that the District Court in Dili has exclusive jurisdiction over "serious criminal offences", namely genocide, war crimes, crimes against humanity, murder, sexual offences and torture. The Transitional Administrator, however, had established Special Panels with the expertise to exercise exclusive jurisdiction over these crimes. The Special Panels are composed of one Timorese and two international judges. A similar panel has been established at the Court of Appeal, to hear appeals from the Special Panels.

41. A point of clarification in relation to the temporal jurisdiction of the Special Panels is warranted at this stage. It would appear that the Special Panels are required to adjudicate serious crimes committed during the period of Indonesian occupation, *including* the campaign of violence in 1999. Moreover, UNTAET Regulation No. 2000/15 provides for universal jurisdiction over genocide, war crimes and crimes against humanity. The Commission has been advised, however, that a decision was taken by the SCU at the early stages of its operations to focus its resources and mandate on the events of 1999, although some investigations were conducted into pre-1999 incidents. A contrary view is that section 163 of the Constitution of Timor-Leste, effective as of the date of independence, implies that the jurisdiction of the Special Panels is limited to crimes committed in 1999. Sources also noted that Security Council resolution 1543 (2004) directed the SCU to concentrate on concluding 10 priority cases and "widespread pattern" cases from 1999. The SCU did not file further indictments after November 2004, as it was concerned that these would result in new trials that could not be completed by the deadline of 20 May 2005 set by the Security Council.

42. The Commission is aware that although its mandate has been restricted to examining judicial processes dealing with events in 1999, it cannot help but be mindful of the contextual background leading to the situation in 1999, in particular the scale and gravity of atrocities committed prior to 1999, during Indonesia's 24-year-long rule over East Timor.

43. The Commission will now proceed to examine the judicial processes in Timor-Leste, including the work of the SCU and Special Panels.

B. Overview of the work of the Serious Crimes Unit

44. When the Serious Crimes Unit (SCU) first commenced operations, its staff were required to work with very limited resources; a former senior staff member notes that the SCU was basically "started from scratch" with a few computers, vehicles and staff. The SCU was built with the support of UNTAET and UNMISET, grants from donor States, bilateral funding and assistance, sometimes out-of-pocket, from international staff, United Nations civilian police (UNPOL), United Nations Volunteers (UNV), local staff and interpreters. However, the former Deputy General Prosecutor for Serious Crimes Siri Frigaard emphasized that whenever she asked the United Nations for additional resources for SCU, senior UNMISET officials gave their full support and tried to secure the necessary resources, although the process did take time.

45. The Commission is firmly convinced that despite the initial difficulties encountered, the staff members of SCU, UNMISET and the Special Panels have discharged their responsibilities diligently, overcoming extraordinary obstacles to complete the investigations and trials under timelines directed by the Security Council.

46. It is with this background in mind that the Commission assesses the work of the SCU.

1. Workload

47. As of April 2005, the SCU had 88 staff members comprising United Nations international civilian staff (such as international advisers to the General Prosecutor, prosecutors, UNV legal officers, one international investigator, logistics personnel, personal assistants, evidence custodians, witness management staff, IT staff, UNPOL, forensic and crime scene staff and interpreters). A number of Timorese are also undergoing training with the SCU, as elaborated below. As of April 2005, the SCU had one investigation team stationed in Dili.[11]

48. Since SCU commenced its work in 2000, 95 indictments have been filed with the Special Panels, indicting a total of 391 persons.[12] At the time of the finalization of the present report, there are charges pending against a total of 339 accused who are at large and outside the jurisdiction of Timor-Leste.

[11] At the height of its operations, SCU had four regional offices covering all 13 districts of Timor-Leste.
[12] Since some defendants facing multiple charges, the total number of defendants amounts to 440.

49. The SCU has identified 10 priority cases involving 202 accused, with at least 183 of whom are at large. In addition to the ten priority cases, in February 2002, the Serious Crimes Unit prioritized resources to investigate those at the leadership level. This includes the indictment of *Wiranto et al.* (issued on 24 February 2003) that charges the former Indonesian Minister of Defence and TNI Commander, Wiranto, six high-ranking TNI commanders, and the former Governor of East Timor with crimes against humanity in connection with the events in East Timor in 1999. [13]

2. Establishing the facts and providing an accurate historical record of the events in 1999

50. The Commission finds that the prosecution in cases before the Special Panels has adduced sufficient evidence to demonstrate the contextual background of the events in 1999, substantiating an attack against the civilian population which was widespread and/or systematic. These facts have been adequately documented in a number of expert and human rights reports submitted at trial and accepted by the Special Panels.

51. In relation to establishing the diversity of crimes committed in 1999, the Commission notes that since the focus of SCU was on murder cases, other serious crimes such as destruction of property, deportation and unlawful transfer cases were not investigated thoroughly. Investigations into cases involving rape and torture remain incomplete. For this reason, the SCU is not able to establish a comprehensive and complete documentation of the diverse nature of the crimes committed during 1999.

52. However, many significant incidents have been recorded in the indictments and supporting materials of the 10 priority cases and others. A number of high-level suspects have been indicted and in some instances, evidence substantiating the charges against them has been documented in public filings. Some of the Special Panels indictees appear on Interpol red notices.[14]

3. Justice for the victims and providing them an opportunity to contribute to the process

53. The SCU has interviewed approximately 6,000 witnesses in the course of its investigations, and hundreds of witnesses' statements have been filed with the Special Panels. Many victims and witnesses have testified before the Special Panels. According to SCU, the cooperation and contribution of victims and witnesses have greatly assisted SCU in its ability to file indictments and secure convictions at trial.

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[13] The Wiranto et al. indictment of the SCU indicts General Wiranto (Indonesian Minister of Defence and Security and Commander of the Armed Forces of Indonesia), Major-General Zacky Makarim (Head of Special Team, Member of Task Force to Oversee the Popular Consultation in East Timor), Major-General Kiki Syahnakri (Assistant for Operations to the Army Chief of Staff and Commander of the Martial Law Operations Command in East Timor), Major-General Adam Damiri, Colonel Tono Suratman, Colonel Mohamed Noer Muis, Lt. Colonel Yayat Sudrajat and Abilio Soares.

[14] An Interpol Red Notice is not an international arrest warrant. The persons concerned are wanted by national jurisdictions (or the International Criminal Tribunals, where appropriate) and Interpol's role is to assist the national police forces in identifying or locating those persons with a view to their arrest and extradition. These red notices allow the warrant to be circulated worldwide with the request that the wanted person be arrested with a view to extradition.

54. The Commission finds that the contributions of victims and witnesses to the serious crimes justice process did assist in community reconciliation and achieved some level of satisfaction for the victims and their families. However, victims' groups have informed the Commission that they remain dissatisfied with SCU for not responding to their key concerns such as locating missing persons and completing investigations into all serious crimes, as well as the inability of SCU to bring those most responsible for serious crimes to justice.

4. Accomplishments in contributing to international humanitarian and international criminal law

55. The Commission notes that the SCU prosecution teams and the Special Panels regularly refer to established jurisprudence developed by other international criminal tribunals, as well as to international human rights standards. The Commission takes the view that the decisions of the Special Panels will, in general, assist in establishing clear jurisprudence and practice for other district courts dealing with serious crimes in future. In addition, the Special Panels has developed its own jurisprudence, departing from the law of other international criminal tribunals whenever appropriate.[15]

5. Contribution to the restoration of peaceful and normal relations between people previously in conflict

56. From its review of cases adjudicated before the Special Panels and from its interaction with victims' groups, the Commission concludes that given the number of cases adjudicated and the number of convictions secured for serious crimes, the judicial process has, to some extent, achieved accountability for the atrocities committed in 1999. However, there is frustration among the people of Timor-Leste with the inability of the judicial process to bring to justice those outside the jurisdiction; similarly, there is concern that the overwhelming majority of offenders convicted by the Special Panels are from Timor-Leste. The Commission has also heard from individuals concerned that there are suspects living among the population, some occupying high-level posts within Timor-Leste, who have not been indicted or brought before the Special Panels.

57. In particular, the sense of dissatisfaction among the people of Timor-Leste stems from the knowledge that the persons who bear the greatest responsibility for planning or ordering serious crimes have not appeared before the Special Panels. The prevailing view among the population of Timor-Leste is that the serious crimes process should continue, but should now focus on securing the high-level indictees still at large.

[15] For example, in its decision in the case of *Deputy General Prosecutor* v. *Alarico Masquita* of 25 November 2004), the Special Panels re-interpreted "persecution" as a crime against humanity as compared with the jurisprudence of the ad hoc international criminal tribunals, requiring that the crime be linked with other crimes, in accordance with the Rome Statute of the International Criminal Court. SCU has also advanced innovative arguments before the Serious Panels on attempted offences. The Special Panels have endorsed the practice of taking judicial notice of certain facts; for example, in the case of *Deputy General Prosecutor* v. *Joni Marques and 9 others* (Case No. 9/2000), the Special Panels made factual findings by relying on the report of the Commission of Inquiry.

6. Extent to which the judicial processes have contributed to strengthening the rule of law in Timor-Leste

58. The Commission finds that since 2000, the serious crimes process in Timor-Leste has indeed contributed to strengthening the rule of law in the country. The Commission has no doubt that Timorese judges, sitting with other international judges at the Special Panels, have built skills and refined capacities through this experience, and that the District Courts of Timor-Leste will benefit from their experiences in the future. The SCU lawyers and the international judges have also been actively involved in training legal professionals to deal with serious crimes, to share their expertise and to inculcate international standards within the legal system of Timor-Leste.

59. Moreover, the issuance of indictments and warrants of arrest concerning more than 339 defendants at large demonstrates – theoretically, at least – that perpetrators of serious crimes cannot enjoy unhindered impunity, as they risk being arrested and tried in Timor-Leste or in another State willing to exercise jurisdiction over them.

C. Obstacles and difficulties

1. Lack of consistent prosecution strategy or focus

60. The Commission is advised that when the SCU was first established in June 2000, it was obvious that its ability to function would be substantially impeded by lack of resources, capacity and expertise. More significantly, the Commission notes that in the first year of its operations, the SCU was lacking an effective prosecution strategy, direction and resource focus. A former senior prosecutor has indicated that prosecutors were not directing investigations, but rather events were dictating priorities. In the early stages of its operations, the SCU launched investigations into many complaints received, mainly in relation to low-levels suspects.

61. In contrast, the Commission notes that the initial policy of the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea and the International Criminal Court as well as the completion policies of the International Criminal Tribunals for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) have ensured resource focus and priority for investigations and prosecutions of mid to high-level perpetrators or those who "bear the greatest responsibility".

62. The United Nations subsequently compelled the SCU to focus on "ten priority cases". Even so, the Commission is advised that there was little rationale underlying the selection of some of these ten priority cases, which also appeared to change from year to year.

63. The Commission concludes that the SCU did not, from the outset, function with a prosecution strategy designed to maximize limited resources. It was only in 2002 that an executive decision was made by the Deputy General Prosecutor for Serious Crimes to investigate those military and political leaders who were allegedly the architects of the serious crimes

committed in 1999 and/or those who failed to take reasonable measures to prevent the crimes or punish the perpetrators. As a result, the *Wiranto et al.* indictment was issued on 23 February 2003. The stringent lack of resources also forced SCU prosecutors to focus investigations on serious crimes committed in 1999, although the SCU was mandated to also investigate crimes committed prior to 1999.

64. The Commission finds that the lack of an effective prosecution strategy and policy from the outset supports to some extent the criticism that the SCU and Special Panels have only succeeded in prosecuting low-level Timorese perpetrators. It cannot be said that the serious crimes process has achieved accountability for those who bear the greatest responsibility for serious crimes.

2. Independence of the Office of the General Prosecutor

65. The Commission is mindful of basic principles relevant to the independence and accountability of prosecutors, primarily as concerns their role in the administration of justice by prosecuting human rights violations and ensuring respect for due process and fair trial. Prosecutors should carry out their professional obligations impartially and objectively, without interference, and should accord special attention to crimes committed by public officials.

66. Following its mission to Timor-Leste, the Commission proposes to review certain aspects of the Office of the General Prosecutor, in particular the role of the General Prosecutor and the independence of his office.

67. In 2001, the Transitional Administrator appointed Dr. Longuinos Monteiro as the General Prosecutor of Timor-Leste. Under the UNTAET Regulations, the General Prosecutor is the principal official and administrative head of the Public Prosecution Service and Office of the General Prosecutor. Regulation No. 2000/16 states that the exercise of prosecutorial authority shall be vested exclusively with the General Prosecutor (sections 12 and 14).

68. The current staff members of SCU have advised the Commission that they have substantial autonomy to investigate and prosecute serious crimes and that with the sole exception of the *Wiranto et al.* indictment, the General Prosecutor has never obstructed their work. Accordingly, the Commission finds it pertinent to discuss in some detail the circumstances surrounding the *Wiranto et al.* indictment as illustrative of one of the more critical obstacles inherent in the serious crimes process in Timor-Leste.

69. The Commission has benefited from a frank discussion with the General Prosecutor. Dr. Monteiro advises that he faces extraordinary challenges in both supporting the SCU and at the same time managing his Office with an eye to the Government policy. He said that there were more than sixty warrants of arrest from Timor-Leste listed in Interpol, and since his Government has to support the arrest and transfer of suspects outside Timor-Leste, he has to take the Government's policies into consideration. He denies direct interference in the work of the SCU, but has been advised that his internal policies cannot be inconsistent with those of the State.

70. In relation to the *Wiranto et al.* indictment charging high-ranking individuals from the Indonesian civil and military structures, only two warrants were initially issued, for Yayat Sudrajat and Wiranto. On 25 June, a single judge of the Special Panels dismissed the request for warrants for lack of supporting evidence. Between 26 June and 17 September 2003, SCU [16]filed supporting materials comprising 34 binders containing 13,000 pages and the statements of 1,500 witnesses with the Special Panels. The matter was transferred to an international judge in mid-January 2004, who issued an arrest warrant for Sudrajat and an arrest warrant for Wiranto in May 2004.

71. Shortly after January 2004, the General Prosecutor gave several press interviews in which he reproached the international judges on the Special Panels for failing to act on the arrest warrant against Wiranto. He urged that the warrant be issued, stating that he would submit it to Interpol.[17] On 10 May 2004, Judge Philip Rapoza issued a 20-page arrest warrant for Wiranto, substantiating the "reasonable grounds" requirement in accordance with section 19A.1 of the Transitional Rules of Criminal Procedure. Immediately thereafter, the General Prosecutor was called to the office of President Gusmão.[18] Subsequently, in a press statement release in May 2004, the General Prosecutor described the warrant for Wiranto requested by the SCU as "premature" and that his men "…have jumped the gun and it was a stupid move. I've filed a letter, not to close the case, but to revise it."[19] President Gusmão also criticized the issuance of the Wiranto warrant. He subsequently went to Bali where he met Wiranto and gave him a much-publicized "bear hug" in public, before the media.

72. On the day after the issuance of the Wiranto warrant, the General Prosecutor sought to retract the warrant application of the Deputy General Prosecutor for Serious Crimes and personally filed a document with the Special Panels to retrieve the *Wiranto et al.* indictment in order to "review" it. On 17 May 2004, the Special Panels rejected the request of the General Prosecutor on the basis that no grounds were provided to amend the indictment.

73. The General Prosecutor publicly announced that he would not submit the warrant to Interpol, as he had to take into consideration the policies of the Government. A former senior staff member of SCU confirmed that the General Prosecutor did not wish to pursue the *Wiranto et al.* indictment and did not forward the warrant of arrest to Interpol.[20]

74. From the issuance of the Wiranto arrest warrant to the date of the present report, the General Prosecutor has no longer submitted warrants issued by the Special Panels to Interpol. Considering the totality of the circumstances, the Commission draws the inference that this is indicative of a policy of the Government of Timor-Leste to decline to pursue indictments against Indonesian nationals.

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[16] This was the status as of April 2005 when the Commission completed its mission in Dili.

[17] "ET Prosecutor Accuses United Nations Judges of Delaying Warrants", *Suara Timor Lorosae*, 16 January 2004.

[18] President Gusmão has indicated to the Commission that in 2004, his Government was asked not to proceed with the *Wiranto et al.* indictment because at the time, Wiranto was a presidential candidate in Indonesia.

[19] Press Report, Associated Press Worldstream, 13 May 2004.

[20] The Commission has established that the General Prosecutor is also the head of the Interpol National Central Bureau in Timor-Leste.

75. The General Prosecutor has explained to the Commission that he needs a clear directive from the Government on whether to continue with the work of the SCU after 20 May 2005, and that he is not optimistic that such a directive will be forthcoming. He emphasized that the conundrum is partly due to the absence of organic laws governing the judicial process in Timor-Leste.

76. According to the General Prosecutor, under the UNTAET Regulations, he is accountable to the Head of State, which explains why his policies have to be "approved" by the latter. With respect, the Commission is unable to concur with this assessment. Although section 133.4 of the Constitution of Timor-Leste provides that the Public Prosecutor is accountable to the Head of State, the Commission does not interpret the provision as permitting the General Prosecutor to be *functionally subordinate to the President*. Moreover, section 132.3 of the Constitution imposes duties of impartiality and objectivity on the General Prosecutor. This is reinforced by section 4.2 of UNTAET Regulation No. 2000/16, which provides that in exercising prosecutorial authority, "public prosecutors shall act without bias and prejudice and in accordance with their impartial assessment of the facts and their understanding of the applicable law in East Timor, without improper influence, direct and indirect, from any source, whether within or outside the civil administration of East Timor." The Commission would suggest that prosecutorial accountability to the Head of State refers principally to accountability for upholding the law and that the transmittal of warrants of arrest constitutes one of the forms of prosecutorial authority conferred on the General Prosecutor.

77. The Commission is cognizant that there is no overarching international standard that guarantees the institutional independence of public prosecutors, as a number of legal systems, particularly in the common law tradition, provide for the appointment of public prosecutors by the executive or impose a duty on public prosecutors to follow certain directives from the executive branch. Nevertheless, the Commission emphasizes that international standards and applicable constitutional law require that public prosecutors in Timor-Leste be afforded safeguards to conduct their work impartially and objectively. The Commission takes the view that while executive directives to public prosecutors on policy matters would tend to conform to international standards, directives on individual cases should be treated with particular caution. The Commission finds cause for grave concern in the decision of the General Prosecutor not to pursue indictments of Indonesian nationals such as Wiranto.

78. On the basis of the foregoing analysis, the Commission finds that there is sufficient evidence to conclude that the Office of the General Prosecutor does not *at present* function independently from the State of Timor-Leste. The ability of the serious crimes process to function without undue political influence is a significant consideration for the Commission in its recommendations to the Secretary-General.

3. Lack of co-operation and inability to arrest indictees outside jurisdiction

79. One of the more critical obstacles affecting the work of the SCU is its inability to arrest, transfer or extradite accused at large outside its jurisdiction.

80. Most of the SCU indictees at large are either seeking refuge or living in Indonesia (including West Timor). Under the provisions of a Memorandum of Understanding regarding Co-operation in Legal, Judicial and Human Rights Related Matters, signed on 5 and 6 April 2000, both the Government of Indonesia and UNTAET are required to provide mutual assistance at the investigative stage, including the execution of arrest warrants, searches and seizures and facilitating transfer of persons. Section 14 of the Memorandum of Understanding also requires the parties to "commit themselves to passing legislation or amending existing legislation." The Commission has established that although the SCU did provide assistance to the Indonesian authorities, this was not on the basis of the Memorandum of Understanding, which Indonesian authorities deem inapplicable as it was never ratified by the Indonesian Parliament. Former Deputy General Prosecutors for Serious Crimes are of the view that cooperation on fundamentals such as arrest and transfer of indictees at large must now be resolved outside the legal sphere and at the political level.

81. The General Prosecutor was involved in the preparatory work for the Memorandum of Understanding, and was hopeful that it could open the door to cooperation. He made a number of overtures to Indonesian counterparts, including the suggestion of a letter rogatory, but the Commission understands that such efforts did not prove fruitful. The General Prosecutor explained that there is no mutuality between Timor-Leste and Indonesia for example, in an extradition treaty, as the Indonesian Government would not benefit from such an arrangement. President Gusmão takes the view that unless the United Nations obtains the cooperation of Indonesia, it would be pointless to retain the SCU beyond 20 May 2005.

82. The Government of Indonesia has publicly stated that it will not cooperate with the Government of Timor-Leste in arresting and transferring indictees to the Special Panels, as it was of the view that the SCU and Special Panels had no jurisdiction to try Indonesian citizens in Timor-Leste.[21] The speaker of the People's Consultative Assembly, Amien Rais, called the charges against Wiranto "offensive and degrading".[22]

83. There is at present no extradition agreement between Indonesia and Timor-Leste or any other form of effective mutual legal assistance framework to enable the arrest and transfer of indictees currently at large. It is unlikely that in the present political climate, the Governments of Indonesia and Timor-Leste would voluntarily enter into such arrangements.

84. The Commission has referred to the *Wiranto et al.* indictment as an illustration of the serious crimes process' inability to extract indictees abroad. The Special Panels were also unable to process arrest warrants for many other indictees at large in West Timor and the General Prosecutor has indicated there are many arrest warrants listed for Interpol which have not been transmitted to the Government of Indonesia. As of May 2005, all arrest warrant requests for the defendants in the *Wiranto et al* case have been allowed by the Special Panels.

85. The Commission notes that the SCU has also been denied access to the gathering of evidence in Indonesia, despite several meetings held between senior SCU staff and the

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21 "Indonesian Politicians React to UN Move to Indict Senior Military," Detik Com, 26 February 2003; and "Indonesia will Ignore Indictments of ex-Officials", Associated Press, 25 February 2003.

22 Press report, *Suara Timor Lorosae* and Associated Press.

Indonesian Attorney-General. In this context, the Commission is advised that SCU staff had requested to interview several high-level suspects in Indonesia and were given permission to do so. The SCU submitted a list of questions that were approved by the Indonesian authorities. However, when the SCU pursued the matter, they were informed that the suspects were "not available". In December 2000, when an UNTAET-SCU team arrived in Jakarta at the invitation of the Attorney-General of Indonesia, a TNI commander declared that no Indonesian officer would be investigated or questioned by UNTAET.

86. The Commission concludes that lack of access to evidence and suspects in Indonesia are critical challenges impeding the progress of the serious crimes processes in Timor-Leste. The Commission finds these factors to be particularly important when identifying the feasible mechanisms to address the prevailing situation of impunity in Timor-Leste and Indonesia in relation to serious violations of human rights committed in 1999.

4. Lack of political will to pursue the serious crimes process

87. Another criticism levelled at the serious crimes process in Timor-Leste is that the judicial process has not been able to match all the expectations of the people of Timor-Leste and of members of the international community who were supportive of the Special Panels.

88. Some individuals interviewed by the Commission are not optimistic about the prospects of pending SCU indictments being processed by the authorities of Timor-Leste after 20 May 2005, as the Government of Timor-Leste wishes to pursue an explicit policy of "friendship" with Indonesia.

89. When the Commission spoke to the President of the National Parliament in Timor-Leste in April 2005, he was not able to confirm whether drafts for national laws incorporating the serious crimes processes or otherwise addressing events in 1999 would be brought before Parliament. He indicated that this was a "very delicate issue" and that there were no concrete plans as yet. He expressed hope that the United Nations would be involved in instituting a justice mechanism, should the United Nations establish a "peace-building" mission after 20 May 2005.

90. The Government of Timor-Leste has unequivocally advised the Commission that the United Nations should continue to take responsibility for the work of the SCU and not transfer the burden of the serious crime process to the Government of Timor-Leste.[23] The Prime Minister of Timor-Leste has indicated to the Commission that he would support the creation an international tribunal for Timor-Leste, although the Government has serious doubts whether the Security Council would agree to such a step.

91. Former Deputy General Prosecutor for Serious Crimes, Mr Nicholas Koumjian observes that the Timorese leaders have a legitimate concern that if they were seen as taking the lead in efforts to bring high level perpetrators to justice, it could harm the immediate and long-term relationship of Timor-Leste with their giant neighbour, the Republic of Indonesia. For this

23 The position of the Government of Timor-Leste was stated to the Commission at a meeting on 6 April 2005 with the Prime Minister, the Minister for Foreign Affairs, the Minister of Justice and the Minister for Administration of State.

reason, he is strongly of the view that any realistic effort to arrest and prosecute high level Indonesian suspects must be the responsibility of the international community and that the burden of doing so should not be placed solely on the Government of Timor-Leste.

92. The Commission concludes from its extensive discussions with President Gusmao and senior Timorese government officials that there is at present no political will or governmental support for the continuation of a serious crimes process under the auspices of the United Nations. This is a critical consideration when examining the options available to address impunity and ensure justice is secured for the people of Timor-Leste.

5. Inadequate and irregular funding

93. The issue of inadequate and irregular funding has been consistently raised as a major impediment to the work of the special crimes process in Timor-Leste. The Commission notes that the functioning of the judicial system in Timor-Leste relies in part on the goodwill and financial contributions of non-United Nations organizations and other States. The issue of funding will be addressed in the recommendations of the Commission, but a number of observations are warranted at this stage.

94. The Commission is concerned that the recent proliferation of internationalized and hybrid criminal tribunals within national justice processes does not necessarily reflect a consistency in approach by the international community, particularly in the degree of financial support available to such tribunals.

95. It is evident that these tribunals differ significantly in their mandate and operating context, and the Commission is mindful of the danger of drawing false comparisons in this regard. Nonetheless, the Commission finds that it would be remiss to recommend the establishment of any form of criminal tribunal without a corollary emphasis on first, the importance of secure, sufficient and sustainable levels of funding and second, strengthening institutional stability in the accomplishment of an investigative, prosecutorial and judicial mandate that must necessarily conform to demanding international standards.

96. In this regard, the Commission notes that the Basic Principles on the Independence of the Judiciary provide that “It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.” (Principle 7). These standards endorsed by the General Assembly for implementation by Member States must also necessarily find expression in the funding processes of internationalized and hybrid criminal tribunals under the auspices or receiving the support of the United Nations.[24] The Commission considers that in the particular context of hybrid tribunals limited in time, and only temporarily meshed to the national justice system, without constitutional status, funding must be initially “secure” in order to be considered “sustainable”.

[24] The Commission also refers to the Latimer House Guidelines for the Commonwealth, in particular a standard the Commission considers to be independent of any particular legal tradition: “Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards”.

97. The Commission makes two specific observations regarding the funding of internationalized and hybrid criminal tribunals. The first falls within the Commission's mandate to review the judicial process in Timor-Leste, while the second is made with reference to the Commission's responsibility to present feasible recommendations to the Secretary-General.

98. First, the Commission must observe that the serious crimes process in Timor-Leste, comprising the SCU and Special Panels, has been funded at a level markedly lower than other internationalized justice processes.

99. The SCU and Special Panels are funded through UNMISET, which receives both assessed and voluntary contributions. For the period 2003-2005, assessed contributions to UNMISET amounted to approximately US$296,557,000, and voluntary contributions amounting to approximately US$120,000. The total operating cost of the SPSC and SCU amounted to US$14,358,600 or around 5 per cent of the overall assessed contribution to UNMISET.[25]

100. The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, a hybrid criminal tribunal, will operate at an estimated cost of US$56,300,000 over a period of three years. The Extraordinary Chambers are entirely dependent on contributions from the United Nations, the Royal Government of Cambodia and donor States. The United Nations contribution to this three-year justice process amounts to US$43,000,000. Pro-rated over two years, this contribution represents more than double the assessed contribution towards the justice process in Timor-Leste in 2003-2005.

101. Similarly, the annualized costs to date of the ad hoc international criminal tribunals amount to approximately US$80,500,000 for ICTY and US$83,000,000 for ICTR. Over two years, these figures represent more than ten times the assessed contribution towards the justice process in Timor-Leste in 2003-2005.[26]

102. The significant resource burden of the ad hoc tribunals is widely recognized as having inclined the international community to explore alternative models of achieving accountability for international crimes and serious violations of human rights, including the establishment of the permanent International Criminal Court as well as hybrid criminal tribunals.

103. Despite this consideration, the Commission must observe that the alternative of purely donor-funded hybrid tribunals such as the Special Court for Sierra Leone has revealed serious funding difficulties in the operations of such courts. In the case of the Special Court for Sierra Leone, a budget gap of approximately US$20,000,000 in the third year of operations, resulting from an insufficient level of voluntary contributions, necessitated a contribution of approximately US$16,700,000 by the United Nations in 2004.

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25 Compilation based on statistics provided by UNMISET.

26 The Commission has compared the budgetary requirements of ICTY for 2004-2005 to illustrate the basic needs requirement of an organization that is expected to investigate, prosecute and adjudicate serious violations of international humanitarian law spanning a jurisdictional period of more than seven years and a vast geographical region. The Commission is by no means drawing similarities between the work of ICTY and the serious crimes processes in Timor-Leste. There are a number of significant differences between these two justice mechanisms.

104. In the course of its mission to Timor-Leste, the Commission has had the opportunity to verify the concrete impact of the level of funding afforded to the Special Panels, SCU and DLU on the accomplishment of their respective mandates. Through primary source materials, responses to specific questions, interviews and numerous reports received, highlighted throughout the present report, the Commission must take the view that the level of funding provided to the judicial process in Timor-Leste has been insufficient to meet the minimum requirements of the mandates of the above-mentioned institutions.

6. Adequacy of legislation

105. The Commission has also considered whether the legal framework applicable to the judicial process in Timor-Leste is adequate and sufficiently clear to enable the Special Panels and SCU to discharge their respective mandates. The Commission finds a notable shortfall in section 19A of the Transitional Rules of Criminal Procedure,[27] which does not prescribe a time limit for the investigating judge to render a decision on the application for an arrest warrant. The Commission is advised by SCU staff that there were a number of warrant applications pending before the Special Panels since 2003.

106. For the most part, however, the Commission finds that there has been little difficulty in the application of UNTAET Regulations and Indonesian subsidiary laws in the judicial process in Timor-Leste.

7. Completion of investigations and preservation of evidence

107. When the SCU completes its mandate in May 2005, it will leave behind 514 "un-indicted cases" (that is, cases for which investigations have been conducted but for which no indictments have been issued), and approximately 50 cases for which no investigations have been instituted. The Commission on Reception, Truth and Reconciliation has advised that 27 serious crimes referrals to SCU have not been resolved on account of lack of resources and given the established deadline of 20 May 2005. Among these outstanding cases, there are 828 possible murder charges; 60 possible charges of rape or gender-based crimes, and possibly hundreds of cases of torture and other acts of violence.

108. The Commission concludes that although the SCU has achieved considerable success in discharging its mandate since 2000, there is a pressing need for the SCU to *complete* its investigations, particularly in relation to serious crimes such as rape, torture and murder. SCU should also be afforded the opportunity to complete its investigations to the extent possible, with a view to identifying all suspects and to issuing indictments and international arrest warrants to facilitate future prosecution.

109. The Deputy General Prosecutor for Serious Crimes has informed the Commission that the SCU has created a database of all investigation files, including a template note of the case and an index of all relevant documents. The documents are currently being translated into Tetum and Portuguese to facilitate integration of the serious crimes process into the national system. The Commission was shown a storage facility at the premises of SCU where physical evidence

[27] UNTAET Regulation No. 2000/30, as amended by UNTAET Regulation No. 2001/25.

relevant to each pending case has been documented and kept in sealed containers. All documentary evidence such as witnesses' statements has been filed in marked filing cabinets. As for the trial record and physical evidence presented at trial, Special Panels support staff have informed us that the record of evidence has been properly documented and will be stored in containers at the Dili District Courts.

110. Many individuals and NGOs have expressed concern that the SCU investigations record and evidence will not be adequately preserved after 20 May 2005. The Commission accepts that there is a need to protect and ensure safekeeping of all available evidence generated during the serious crimes process. In this regard, the Commission notes that on 28 April 2005, the Security Council unanimously adopted resolution 1599 (2005) which underlines the need for the United Nations Secretariat, in agreement with the Timorese authorities, to preserve a copy of all the records compiled by the SCU. The Secretary-General has also decided to maintain a core international staff to facilitate the preservation of the evidence.

111. The Commission's recommendations relevant to the completion of investigations and preservation of evidence are contained in chapter IX.

8. Institutional capability of the Serious Crimes Unit after 20 May 2005

112. In resolution 1543 (2004), the Security Council decided that the Serious Crimes Unit should complete all its investigations by November 2004 and conclude trials and other activities by 20 May 2005. This decision was reiterated in resolution 1573 (2004). As of 20 May, the serious crimes process will no longer fall within the auspices of the United Nations but will be returned to the Timorese authorities.

113. In light of the Security Council's decision, the Commission must now assess whether the relevant national legal and judicial institutions have the capacity to assume responsibility for the investigation, prosecution and adjudication of serious crimes.

114. The Commission has been advised by the former Deputy General Prosecutor for Serious Crimes, Ms Siri Frigaard that upon her arrival in Dili in 2002, there were no professional staff members from Timor-Leste in the SCU apart from one prosecutor who left for Portugal for studies a few months later. Most of the locally-recruited staff members were working in the Ordinary Crimes Unit. Their skills and experience were limited and she did not consider them qualified or capable of handling serious crimes prosecutions. She managed to obtain donor funding through the Government of Norway to employ prosecutors and support staff from Timor-Leste to be trained by the international staff of the SCU.

115. The present staff of the SCU have emphasized that the Office of the General Prosecutor does not have sufficient institutional capability to take over SCU cases after 20 May 2005 once the United Nations and international staff leave Timor-Leste. The Commission is concerned that their departure would result in a void of experienced prosecutors, investigators and other professional support staff. The removal of United Nations infrastructure and funding will also have severe repercussions on the ability of the SCU to function effectively.

116. It has also been observed that although training sessions for Timorese prosecutors and lawyers were funded and conducted by the United Nations, the training was not optimally effective because of poor communication between the trainers and trainees and partly also because inadequate funding resulted in low-quality translation facilities. Moreover, although several organizations were providing training to local SCU staff, such training programmes were not properly coordinated, resulting in disjunction or unwarranted overlap. Furthermore, training was mainly conducted in Portuguese and was thus less effective for the large majority of participants.

117. The General Prosecutor also takes the view that the SCU lacks the capacity to continue its work without United Nations support. The Deputy General Prosecutor for Serious Crimes and his staff are not optimistic that Timorese staff members would have developed all the capacities required to undertake the work of serious crimes, although they have been trained for the last five years. Most of the trainee prosecutors joined the office after graduation, have received little extensive training for ordinary crimes cases, and thus cannot be expected to prosecute cases of crimes against humanity without specialized and extensive practical exposure.

118. As of 25 April 2005, the Commission of Public Prosecutors of Timor-Leste has yet to announce the results of its evaluation of public prosecutors. According to one NGO, there are at present only five public prosecutors to cope with a backlog of about 3,000 cases as other public prosecutors are in full-time training at the Judicial Training Centre.[28]

119. The Commission finds that if the international component were removed from the Timor-Leste judicial process, it would be impractical to expect that national institutions would have the capacity, in the foreseeable future, to undertake the investigation and prosecution of serious crimes.

D. Overview of the work of the Special Panels

120. By April 2005, the Special Panels had completed all 55 trials brought before them. The Special Panels have conducted a total of eight trials in 2005 and the last verdict was announced on 22 April 2005. During the period 2004-2005, the Special Panels have adjudicated cases involving 46 per cent of the total number of defendants indicted before them. A total of 84 defendants were convicted after trial, 24 pleaded guilty and four were acquitted. The cases of 13 defendants were dismissed by the Special Panels or withdrawn by the Prosecution. The Commission is informed that all outstanding warrant requests have been ruled upon, thus meeting the deadline of 20 May 2005. As of April 2005, out of 290 arrest warrant applications received from SCU, 285 arrest warrants had been granted and 5 denied. All warrant requests for all defendants in the *Wiranto et al* indictment were ruled upon and allowed.

121. The highest sentences were those handed down by the Special Panels in the *Los Palos* case, in which three of the accused were sentenced to 33 years (later reduced to 25 years on the basis of a Presidential pardon) and others were sentenced to about 23 years (*Los Palos* case); 20 years in the *Armando dos Santos* case; other sentences of imprisonment range from three to 20 years.

[28] JSMP Press Release, 14 April 2005.

122. The Special Panels commenced their work at a time when the entire judicial system of East Timor was recovering from the loss of personnel and infrastructure brought about by the violence of 1999. It was, as stated by Judge Philip Rapoza recently, “a judicial wasteland”.[29] However, at the conclusion of 2001, the Special Panels had already held 13 trials.

123. The appointment of a Judge Coordinator, Judge Philip Rapoza, has resulted in improvement in the management and coordination of trials. The conduct of hearings became more efficient after the establishment of split panels, allowing two panels to sit at the same time. The introduction of pre-trial conference reduced filings of pre-trial motions and had a positive impact on the length of proceedings.

124. Trial observers have consistently noted a marked improvement from the early days in regard to the execution of administrative functions by the Special Panels, the conduct of court hearings and the quality of written judgements and decisions.

125. The Commission concludes that the Special Panels have provided an effective forum for victims and witnesses to relate their experiences and provide evidence in ensuring accountability for those responsible for the crimes committed in 1999. The number and quality of some of the judgements rendered is also testimony of the ability of the Special Panels to establish an accurate historical record of the facts and events of 1999 during the short duration of its work.

126. The serious crimes process, including the work of the Special Panels, has also significantly contributed to strengthening respect for the rule of law in Timor-Leste and has encouraged the community to participate in the process of reconciliation and justice. The existence of an effective and credible judicial process such as the Special Panels has also discouraged private retributive and vengeful attacks. The Commission is aware, however, that the community is not entirely satisfied with the justice process and that reconciliation is not the only response to some of the concerns raised by segments of the Timor-Leste community.

E. Obstacles and difficulties

1. Inadequate human expertise and other resources

127. The lack of resources faced by the Special Panels in the early days of their establishment was particularly acute, including the lack of judges, support staff, computers and legal resources.[30] The conditions have improved since then, but it was pointed out to the Commission during personal interviews with staff of the Special Panels that the judges still do not have secretaries, stenographers or personal assistants. The Commission notes that the absence of legal support and infrastructure such as international law clerks and a law library are reflected in the quality of decisions and judgments, although there has been an overall improvement since the inception of the Special Panels.[31] The lack of court stenographers has resulted in delays in obtaining transcripts of proceedings, and the lack of qualified court translators may have resulted

[29] “The Serious Crimes Process in Timor-Leste: Accomplishments, Challenges and Lessons Learned,” delivered at an international symposium on UN Peacekeeping operations in post-conflict Timor-Leste on 28 April 2005.
[30] JSMP Report, “Justice for Timor Leste: The Way Forward”.
[31] In September 2004, the Special Panels hired its first experienced international law clerk.

in inaccurate transcripts of court proceedings. The court clerks have also highlighted the lack of security provisions for the judges and their staff. When the Commission toured the Special Panels premises, the Commission noted that there was no security system in place or security personnel on the premises, with the exception of a solitary private security guard on duty for the rendering of a judgement against one of the accused.

128. The Court of Appeals also suffers from similar resource deficiencies such as the lack of translators, research assistants and stenographers. The backlog of cases on appeal has resulted in delays in rendering decisions.[32]

129. During the first two years, the work of the Special Panels was significantly impeded by lengthy delays due to inefficient recruitment practices and funding of international judges. For instance, the second panel was not operative until November 2001 primarily because Portuguese-speaking international judges from civil law jurisdictions could not be recruited.

130. At the time of our mission to Dili, there were three panels dealing with serious crimes, comprising six international judges and three judges from Timor-Leste. The administrative support system of the Special Panels is headed by the Judge Coordinator (an international staff member); the Coordinator manages the court clerks, the Translation/Transcription Office and the Legal Research Office and coordinates the work of the judges. These offices are partially funded by UNMISET, are headed by international staff and are slated for closure after 20 May 2005.

131. The UNMISET Human Rights Unit (HRU) has been monitoring trial proceedings at the Special Panels. As concerns the substantive judgements and decisions of the Special Panels, the HRU has observed inconsistencies in practice and application of the law, in particular with regard to sentencing decisions.[33] HRU attributes these inconsistencies to the diverse legal backgrounds of the international judges and lack of coordination between the panels (in the days before the Judge Coordinator role was established), and notes that defective decisions at trial were not remedied on appeal because appeals judges lacked particular expertise in human rights and international law. For instance, in December 2003, the Court of Appeal ruled that Indonesian law applies in East Timor, overturning its controversial decision in the *Armando dos Santos* case issued in July, which ruled that Portuguese, not Indonesian, was the de facto law of East Timor. The Commission notes that the *Armando dos Santos* decision adopts Portuguese law without providing a reasoned opinion, as required in accordance with well-established international standards. In later trials, the Special Panels rejected the *Armando dos Santos* appeals decision as unconstitutional. It would appear that the Court of Appeal had decided to apply Portuguese civil law and procedure, which is inconsistent with the judicial practice of the Special Panels.

132. The Commission finds that during the first two and half years of its operations, the Special Panels suffered from lack of capacity, inadequate administrative support, infrastructure, and organizational planning. These difficulties were only resolved late in the life of the Special Panels, and trials have been proceeding without any major impediments. The progress and achievements of the Special Panels are also well documented and have been outlined above.

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[32] For instance, the case of *Augustos Tavares* was scheduled for hearing on appeal after a period of three and a half years.

[33] Concern has also been expressed at the treatment of admissibility of statements of witnesses and confessions.

2. Institutional capacity of Special Panels after 20 May 2005

133. In accordance with the Security Council's resolutions, the Special Panels have also been implementing a hand-over programme to the national District Courts.

134. The Judge Coordinator of the Special Panels is of the view that once the international staff leave after 20 May 2005, it would be a significant challenge to reconstruct the Special Panels. He also questions the will of national authorities to pursue the serious crimes process in its current form, even if international assistance were provided and despite the presence of a number of talented local judges. He has also expressed concern that the 339 indictees before the Special Panels, especially those in West Timor, might return to Timor-Leste in the absence of an effective mechanism to address impunity.

135. In relation to the institutional capacity of the judiciary, the Commission notes that on 25 January 2005, the Superior Council of the Judiciary of Timor-Leste, which is the constitutionally mandated judicial oversight body, announced that all Timorese probationary judges had failed their written examinations. As a result, no Timorese judges could be promoted from probationary status and would apparently no longer hear cases now that their probationary period has expired. 19 judges are appealing the examination results. Notwithstanding the examination results, on 5 February 2005 the Superior Council announced that three judges would continue to serve on the Special Panels and another would continue to serve on the Court of Appeal until the scheduled end of the UNMISET mandate on 20 May 2005. Since the Timorese judges have failed their evaluations, without prejudice to ongoing appeals of examination results, the Commission is doubtful that they can be considered to possess, without further adequate training and experience, the qualifications required in Timor-Leste for appointment to judicial office, as required under Article 23.2 of UNTAET Regulation 2000/15 and therefore permitted to hear cases.[34]

136. The President of the Court of Appeal has advised the Commission that after 20 May 2005, all international judges and lawyers should be retained to enable the serious crimes before the Special Panels to continue to function. He stressed that the departure of the United Nations will result in a depletion of skills, resources and funds and that this will cause the entire judicial system "*to collapse*". The Commission notes that the hiring of additional international judges is permitted under the current UNTAET Regulations, without the need for further amendments. The District Courts have hired seven international judges who are presently trying all the criminal cases in the District Courts except the Special Panels, which require the inclusion of a Timorese judge, in accordance with the Constitution of Timor-Leste.

137. The Commission finds it improbable that local staff would be able to continue the work of the administrative office of the Special Panels without the presence of some international staff. Apart from their administrative duties, the court clerks double as legal researchers for the judges. The Commission sees a clear need for additional resources in areas such as security, legal research and assistants to enable the administrative staff and judges to function more effectively and efficiently.

[34] As observed in the JSMP Report "Overview of the Justice Sector".

138. The Commission concludes that the Special Panels do not, as yet, have the institutional capacity to hear and adjudicate serious crimes cases without an international component.

F. Overview of the Defence Lawyers Unit

139. The UNMISET Defence Lawyer's Unit (DLU) was established in September 2002 to address difficulties encountered in the legal representation of the accused before the Special Panels. Prior to the establishment of DLU, legal representation was provided on an ad hoc basis, due to the lack of local qualified professional defence counsel available for this purpose.

140. DLU is mandated to provide equal access to competent and effective legal representation to the accused in cases before the Special Panels; to ensure respect for the fundamental rights of the accused; and to ensure that internationally recognized fair trial standards are adhered to.

141. As of April 2005, DLU was headed by the Chief Defence Council and comprised seven defence lawyers, three UNV defence assistants/counsel, two UNV defence investigators, two UNV interpreters/translators and five assistants in the fields of language, logistics and administration.

142. From September 2002 until September 2004, DLU has provided representation for all defendants in about 30 trial and appellate proceedings. It is anticipated that appellate proceedings will continue beyond 20 May 2005. Amongst the 30 cases completed by the DLU, 23 cases resulted in conviction at trial, 3 cases resulted in acquitted at trial and 4 cases were withdrawn. Of the three cases resulting in acquittal at trial, one was overturned on appeal. The vast majority of appeals from convictions have been rejected.

143. DLU has been credited for its genuine and vigorous efforts to uphold the rights of the accused before the Special Panels, in difficult circumstances and faced with a number of serious obstacles to which the Commission now gives consideration.

G. Obstacles and difficulties

1. Inadequacy of resources

144. The overall effectiveness of DLU has been hampered by a pressing lack of resources in three key areas: investigative capacity, legal research tools and expert consultants.

145. As of April 2004, DLU had two UNV investigators on staff, supporting eleven lawyers. Although the Public Prosecutor has a legal duty to "investigate incriminating and exonerating circumstances equally",[35] the DLU has at times been required to function without adequate investigative assistance.

[35] UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, as amended, section 7.2.

146. DLU does not have access to legal research tools such as specialized databases of case law of internationalized criminal tribunals, national cases involving crimes against humanity, and general criminal law of the major legal systems of the world. The absence of an adequately equipped library is also a serious obstacle to the preparation of a full and effective defence. If such open source material is provided to the SCU, the Commission advises that it should also be made available on a collegial basis to the DLU.

147. DLU also lacks the necessary resources to hire expert consultants on issues such as forensics, psychiatry, toxicology, sociology and history, and is thus limited in its ability to advance special defences or to rebut scientific evidence adduced by the prosecution. The Commission concludes that DLU should be afforded the means to access such defence experts where strictly necessary to mount a full and effective defence.

2. Inability to access witnesses

148. The Commission is deeply concerned by the lack of cooperation experienced by DLU investigators seeking to access defence witnesses located in West Timor. The inability of DLU to access both witnesses and accused on provisional release within Timor-Leste is exacerbated by the realities of the duty station, such as the inaccessibility of rural locations and lack of rural communications and facilities.

H. Conclusion

149. The lack of resources experienced by DLU has prevented this unit from playing a much-needed role in capacity-building of local defence counsel in Timor-Leste. The national justice system would be significantly strengthened through transfer of legal knowledge and advocacy skills relevant to complex criminal cases to local defence counsel. It is also unlikely that the serious crimes process will experience a proliferation of local defence counsel before the Special Panels due to the “stigma” and lack of security experienced by local lawyers who decide to defend former militia members.

150. The Commission finds that there are a number of circumstances justifying retaining the international component in the legal defence sector. These include the provision of legal representation in applications for conditional or early release pending appeals, and trials of indictees currently outside the territory of Timor-Leste but who may eventually return. Until such time as a cadre of Timorese defence counsel gain significant training and experience in complex criminal cases, the Commission sees a clear need for a small number of highly qualified international defence counsel with demonstrated communication and case management skills to be retained under the auspices of the United Nations Office in Timor-Leste (UNOTIL), gradually transferring their case load to co-counsel from Timor-Leste, while initially providing supervision and training, and later guidance and collegial advice.

151. The Commission concludes the review of the serious crimes process in Dili and will now turn to examine the judicial process in the Republic of Indonesia.

III. The Ad Hoc Human Rights Court for Timor-Leste (Indonesia)

A. Institutional and legal framework

152. The Indonesian judicial system is composed of five types of lower courts and a Supreme Court, which is the highest judicial tribunal and the final court of appeal in Indonesia.

1. Act 26/2000 on Human Rights Court

153. The Ad Hoc Human Rights Court (Ad Hoc Court) was established pursuant to Act 26/2000 after a lengthy legislative process involving some 11 drafts, built on a framework of previous legislation and relevant Government regulations and presidential decrees.

154. The Republic of Indonesia initially promulgated Act 39/1999 as “a realisation of the Indonesian nation’s responsibility as a member of the United Nations,” particularly to “implement the Universal Declaration of Human Rights” and several other international instruments. The provisions of this act enumerate detailed substantive rights, as well as “human obligations” and “Government duties and obligations”, provide for public participation in the promotion and protection of human rights, and define the specific functions and powers of the National Commission on Human Rights (Komnas HAM).

155. Article 104, paragraph 1, of the act provides for the establishment of a human rights tribunal within the District Court, in order to “hear gross violations of human rights”.

156. On this basis, the Republic of Indonesia promulgated Act 26/2000, recognizing the character of gross human rights violations as “extraordinary crimes” which require “inquiry, investigation, prosecution and hearing of a specific nature”. The legislation also provides for the establishment of ad hoc courts to “hear and rule on cases of gross human rights violations perpetrated prior to the coming into force of this Act”. Such ad hoc courts are established by Presidential decree upon recommendation of the House of Representatives.

157. Thus, the legislation establishes a permanent Human Rights Court with jurisdiction over serious crimes such as genocide and crimes against humanity with temporal jurisdiction over crimes committed *after* the coming into force of Act 26/2000. However, the prosecutions relevant to Timor-Leste were tried before a special Ad Hoc Court on East Timor (Ad Hoc Court) with jurisdiction over crimes committed *before* Act 26/2000 was promulgated. The Ad Hoc Human Rights Court forms part of the Indonesian judicial system.

158. Act 26/2000 envisages several distinct phases in the investigation and prosecution of serious violations of human rights. First, an inquiry phase is conducted by Komnas HAM. The report on the inquiry is submitted to the Attorney–General and serves as a basis for the criminal/judicial investigation at the second stage, conducted by the Attorney-General’s Office based in Jakarta. The investigating prosecutor informs the president of the District Court of his or her findings, who decides whether there is sufficient evidence to proceed to trial. The third stage

(prosecution) begins with the reading of the indictment, followed by the presentation of evidence by the prosecution and the defence, and a summary of the conclusions and final pleas and requests of the parties. The court then withdraws to determine the verdict.[36] A defendant who has been tried before the Ad Hoc Court can lodge an appeal to the High Court (*Pengadilan Tinggi*) and in cassation, on specific grounds, against High Court decisions before the Supreme Court (*Mahkamah Agung*). It is accepted practice, although not specifically provided for in law, that the prosecutor lodges an appeal against acquittals directly to the Supreme Court.

159. Act 26/2000 was enacted specifically to address "gross violations of human rights", defined as crimes against humanity and genocide.[37] This act is supplementary to existing legislation, including Act 39/2000, the Indonesian Penal Code (KUHP) and the Indonesian Code of Criminal Procedure (KUHAP). The Commission notes that although Presidential Decree 53/2001 empowered the Act Hoc Court to investigate gross human rights violations that occurred after the popular consultation in August 1999, a subsequent Presidential Decree (96/2001 of August 2001) restricted the jurisdiction of the Ad Hoc Court to only 3 of the 13 districts in East Timor (Liquiça, Dili and Suai), but extended the temporal mandate to include the months of April and September 1999. The consequences of these temporal and geographical limitations are discussed below.

2. The KPP HAM Report

160. The KPP HAM Report was prepared to fulfil the mandate assigned by Komnas HAM on 22 September 1999, based on the deteriorating human rights situation in East Timor. The mandate arose from art. 89, paragraph 3, of Act 39/1999 on Basic Human Rights and pursuant to articles 10, paragraph 1, and 11 of Government Regulation No.1 of 1999 (PERPU) on the establishment of the Ad Hoc Court.

161. The final recommendation of KPP HAM was to request, through Komnas HAM, that the Attorney-General's Office investigate and prosecute in the Ad Hoc Court those suspected of gross violations of human rights in East Timor that occurred from January to October 1999.

162. The terms of reference of KPP HAM were:

- To assemble information and search for evidence in relation to violations of human rights that occurred in East Timor from January 1999 until the People's Consultative Assembly issued a decree in October 1999 recognizing the ballot results, with special attention to gross violations of human rights such as genocide, massacre, torture, enforced displacement, crimes against women and children and scorched earth policies;

- To investigate the level of involvement by the apparatus of State and/or other bodies, national and international, in these crimes; and

- To formulate the results as basis for prosecutions in the Human Rights Court.

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36 Indonesian Code of Criminal Procedure (KUHAP), articles 137-145.

37 As initially established by Presidential Decree 53/2001 in April 2001.

163. KPP HAM began its work on 23 September 1999 and completed its report on 31 January 2000. From the outset, KPP HAM emphasized that the purpose of its report was to provide Komnas HAM with a set of findings as well as data, results and evaluations collected regarding human rights violations, which would in turn pass these results on to the Attorney-General to conduct further investigations and, given a sufficient basis, to conduct prosecutions before the Ad Hoc Court.

164. KPP HAM comprised nine individuals from Komnas HAM, together with leaders in the field of human rights. Its work was supported by a research assistant support team tasked to provide technical help for field investigation and data processing; it consisted of 12 individuals in the Assistant Team, 8 persons in the Information and Documentation Team, 7 persons in the secretariat and 3 resource persons. KPP HAM explained in its report that for purposes of accuracy, it focused its inquiry on all those involved in human rights violations and targeted five "special" cases, namely incidents at the Dili Diocese, Bishop Belo's house, Liquiça, Maliana and Suai.

165. The report elaborated on the inquiry methodology, which involved the establishment of a secretariat in West Timor and consultations with international advisers such as the International Investigative Commission.

166. The Commission is of the view that under the prevailing circumstances, and in spite of obstacles such as the absence of a protocol on evidence-sharing between KPP HAM, UNTAET and INTERFET that could have contributed to a more comprehensive and stronger report, the inquiry procedures of KPP HAM nonetheless conform to applicable international standards.

167. The Commission finds the report produced by KPP HAM to be a genuine and impartial effort to inquire into serious human rights violations, reflecting the firm commitment of its members to establish the facts. The report provides a firm and credible template for further investigations, particularly in areas where there might have been lack of cooperation or access to information. This is consistent with the mandate of KPP HAM, which was to formulate the results of the inquiry as a basis for further investigation by the Attorney-General's Office and potential prosecutions before the Ad Hoc Court.

168. The Commission will now turn to an analysis of the prosecutions and trials conducted before the Ad Hoc Court.

B. Overview of the judicial process before the Ad Hoc Court

169. From the list of approximately 22 suspects prepared by KPP HAM, the Attorney-General decided to commence proceedings against eighteen individuals, comprising 10 military officers, five police officers, two civilian government officials and a militia leader. The most senior officer indicted was Major-General Adam Damiri, although other senior targets such as General Wiranto and Major-General Zacky Anwar Makarim were listed for investigation by KPP HAM, but were not indicted by the Attorney-General's Office.

170. A synopsis of the results of the Ad Hoc Court proceedings follows:[38]

- Major-General Adam Damiri, Regional Military Commander IX/Udayana, was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was convicted on 5 August 2003 and sentenced to three years' imprisonment. His conviction was overturned on appeal to the High Court in 2004 and affirmed by the Supreme Court in February 2005.

- Brigadier-General Tono Suratman, Commander, Military Resort 164/Wira Dharma, was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was acquitted on 22 May 2003. The Attorney-General's appeal to the Supreme Court was dismissed for reasons discussed below.

- Brigadier-General Mohamed Noer Muis, Commander, Military Resort 164/Wira Dharma (replacing Tono Suratman) was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was convicted and sentenced to five years' imprisonment. His conviction was overturned on appeal to the High Court in 2004.The Attorney-General's appeal to the Supreme Court is pending.

- Colonel Yayat Sudrajat, Commander, Tribuana VIII, Military Intelligence Unit, was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was acquitted on 30 December 2002 and in August 2004, his acquittal was upheld by the Supreme Court.

- Lt. Colonel Hulman Gultom, Dili District Police Chief, was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was convicted on 20 January 2003 and sentenced to three years' imprisonment. His conviction was overturned on appeal by the High Court. The Attorney-General's appeal to the Supreme Court is pending.

- In relation to the Suai case, Colonel Herman Sudyono, Colonel Lilik Koeshardianto, Lt. Gatot Subiaktoro, Capt. Achmad Syamsuddin and Capt. Sugito were jointly charged with two counts of murder as crimes against humanity on the basis of command responsibility and by attempting, plotting or assisting. All defendants were acquitted on 15 August 2002 and their acquittals were upheld by the Supreme Court in March 2004.

- In relation to the Liquiça case, Lt. Colonel Asep Kuswani, Lt. Colonel Adios Salova and Leoneto Martins were jointly charged with murder and persecution as crimes against humanity on the basis of command responsibility. All defendants were acquitted on 29 November 2002. The Attorney-General's appeal to the Supreme Court is pending.

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[38] Results provided by the Attorney-General's Office, Republic of Indonesia and Amnesty International.

- Abilio Jose Soares, Governor of East Timor, was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was convicted on 14 August 2002 and his conviction was upheld by the Supreme Court. His application for judicial review before the Supreme Court was successful and he was acquitted of all charges and released from prison in November 2004.

- Brigadier-General Timbul Silaen, Chief of Police for East Timor, was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was acquitted on 15 August 2002 and his acquittal was upheld by the Supreme Court.

- Lt. Colonel Endar Priyanto, District Military Commander for Dili, was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was acquitted on 29 November 2002 and his acquittal was upheld by the Supreme Court in June 2004.

- Lt. Colonel Soedjarwo, District Military Commander for Dili, was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was convicted on 27 December 2002 and sentenced to five years' imprisonment. The High Court overturned his appeal in 2004 and the Attorney-General has appealed to the Supreme Court.

- Eurico Guterres, Aitarak Militia Commander and Deputy Commander of the Pro-Integrations Forces (PPI), was charged with murder and persecution as crimes against humanity on the basis of command responsibility. He was convicted and sentenced to 10 years' imprisonment. In 2004, his conviction was upheld by the High Court but his sentence was reduced to five years. He is free pending appeal to the Supreme Court.

171. In summary, all the accused before the Ad Hoc Court were acquitted either at trial or on appeal except for one, Eurico Guterres, whose appeal has yet to be heard. None of the accused was detained pending trial or after conviction, and only one of them has served a total of 112 days in prison before he was released. None of the accused holding military office was suspended from their active military duties pending trial or appeal. At least one accused holding military office, Major-General Adam Damiri, was given further command responsibility in Aceh Province during his trial and pending his appeal from conviction. In April 2005, another senior military official, Brigadier-General Tono Suratman, was appointed as chief spokesman for the TNI.

C. Effectiveness of applicable legislation

172. The Commission will now examine the legislative framework of the Ad Hoc Court, in particular Act 39/1999, Act 26/2000 and applicable presidential decrees, in light of relevant international standards. The Commission will later consider the impact of particular legislative provisions on proceedings before the Ad Hoc Court.

173. In summary, by Presidential Decree 53/2001 of April 2001, an Ad Hoc Court was established at the Central Jakarta District Court (*Pengadilan Negeri*) with jurisdiction over gross human rights violations that occurred in East Timor after the popular consultation of 1999. This decree was subsequently revised by Presidential Decree 96/2001 of August 2001, which restricted the jurisdiction *ratione loci* of the Ad Hoc Court to only 3 of the 13 districts of East Timor (Liquiça, Dili and Suai) but extended its jurisdiction *ratione temporis* to include the periods of April and September 1999.

174. The Commission has examined the KPP HAM report in detail and observes that it provides evidence of "gross violations of human rights" in districts and during periods other than those specified in Presidential Decree 96/2001. Even applying an expansive margin of appreciation, the Commission is unable to discern objective grounds for the specific jurisdictional limitations imposed by Presidential Decree 96/2001. Indeed, the legislative framework implemented by this decree vests the Attorney-General with the responsibility to undertake investigations into gross violations of human rights, including the assessment of sufficiency of evidence for prosecution.[39]

175. The Commission will now consider the definition of substantive elements of crimes contained in Act 26/2000 that are relevant to the indictments and judgements of the Ad Hoc Court. In this regard, the Commission observes that the explanatory notes to Act 26/2000 refer to the Rome Statute as the applicable source of law for the definitions of genocide and crimes against humanity. The relevant section of the explanatory notes provides the crime of genocide and crimes against humanity in this provision are in accordance with "The Statute of The International Criminal Court" (Article 6 and Article 7)."[40] The incorporation of provisions of the Rome Statute in Act 26/2000 is confirmed by jurisprudential discussion, inter alia, in the *Timbul Silaen* and *Adam Damiri* judgements.

176. First, the Commission observes that article 9 of Act 26/2000 defines the act of persecution as "persecution of a certain group or collectivity that is based on the same [enumerated] grounds", in contradistinction to article 7(1) of the Rome Statute, which defines the act as "persecution against any identifiable group or collectivity on [enumerated] grounds". In other words, the Rome Statue requires that the persecution itself be based on enumerated, discriminatory grounds prohibited by international law, whereas the Indonesian legislation requires that the group be defined on such grounds. This formulation may dilute the mental element of discriminatory intent characteristic of the crime of persecution.

177. Second, the Commission observes that unlike article 7(1) of the Rome Statute, art. 9 of Act 26/2000 does not criminalize "other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental and physical health". The Commission notes that several instances of conduct identified in the KPP HAM report may have constituted "other inhuman acts", and is concerned at the absence of an appropriate legislative provision in Act 26/2000 to cover such conduct.

[39] Act 26/2000, articles 21(1) and 22(4).
[40] Notes to Act 26/2000, article 7

178. The Commission will now consider the legal requirements of modes of liability in Act 26/2000 relevant to the indictments and judgements of the Ad Hoc Court.

179. First, the Commission observes that article 42, paragraph 1, of the act defines the subjective requirement of command responsibility as "the military commander…knew or, owing to the circumstances at the time, should have known that forces *were committing or just had committed* serious violations of human rights". An alternative translation of the italicized portion of the text provides: "…the troops *are perpetrating or have recently perpetrated* a gross violation of human rights." This contrasts with article 28(a) of the Rome Statute, which provides "…the forces *were committing or about to commit* such crimes." A United Nations trial observer has noted that the expression "about to commit" in article 28(a) of the Rome Statute has been translated into Bahasa Indonesia as "baru saja" ("just now"). Thus, the subjective requirement of command responsibility applied in the proceedings before the Ad Hoc Court may not reflect the responsibility of the commander under international law over crimes where the commander knew, or should have known, that the crimes were *about to be committed*.

180. Second, the Commission notes identical concerns regarding the definition of the subjective requirement of superior responsibility in art. 42(2) of Act 26/2000 ("…*were committing or just had committed* serious violations of human rights"), as compared to article 28(b) of the Rome Statute ("…*were committing or about to commit* such crimes"). The Commission observes that the proceedings against Damiri as a commander under article 42(1) of Act 26/2000 and against Silaen as a superior under article 42(2) of Act 26/2000 apply the subjective requirement as defined in the act.

181. Third, the Commission observes that article 42(2) of the act omits one of the distinctive objective requirements for superior responsibility, namely that "the crimes concerned activities that were within the effective responsibility and control of the superior", as provided in article 28(b)(ii) of the Rome Statute. Thus, Act 26/2000 seems to broaden the scope of responsibility of civilian and police superiors.

182. The Commission will now consider the provisions governing arrest and detention in Act 26/2000 relevant to the indictments and judgements of the Ad Hoc Court.

183. Articles 11 to 19 of the act authorize the arrest of persons "strongly suspected of perpetrating" a gross violation of human rights, and their detention pending and during trial and pending appeal to the Supreme Court. The Act establishes maximum time limits for detention at each stage of the proceedings.

184. The Commission notes that none of these provisions have been applied to detain the accused in cases before the Ad Hoc Court, including those convicted at trial pending their appeals. Judicial decisions not to issue detention orders appear to be based on the degree of cooperation shown by the accused during the trial and the absence of fear of flight or recidivism. While relevant international standards, inter alia, article 9, paragraph 3, of the International Covenant on Civil and Political Rights, require that pre-trial detention in custody should not be a general rule, it may well be that the decision not to detain the accused was based on the

underestimation of the extreme gravity of the crimes charged.[41] The Commission is also gravely concerned that in the absence of detention during trial and pending appeal, at least one accused continued to serve as a military commander on active duty in another province of Indonesia during his trial, as well as pending appeal of his conviction for gross human rights violations.[42] This judicial practice therefore requires clarification and review within the Indonesian legal system.

185. The Commission will now consider the penalties provided in Act 26/2000 relevant to the crimes heard before the Ad Hoc Court.

186. Articles 36 to 40 of Act 26/2000 prescribe facultative maximum sentences of death, imprisonment for life or for a term, and minimum terms of imprisonment. Prescribed terms of imprisonment range from 10 to 25 years for genocide and the crimes against humanity of murder, extermination, deportation or forcible transfer, imprisonment or other severe deprivation of physical liberty or apartheid; 10 to 20 years for the crimes against humanity of rape and other forms of sexual violence, persecution, and enforced disappearance; and 5 to 15 years for the crimes against humanity of enslavement and torture.

187. This sentencing range appears to apply to all modes of liability, including individual perpetration (arts. 36-40), attempting, plotting or assisting (art. 41), command responsibility and superior responsibility (art. 42(3)).

188. For the purposes of this analysis, the Commission is particularly concerned that the minimum sentences prescribed by Act 26/2000 appear to have been set aside by the Ad Hoc Court in sentencing five of the six defendants convicted at trial, each of whom was convicted of the crimes against humanity of murder and persecution (assault), carrying a statutory minimum term of imprisonment of ten years. At trial, Soares, Gultom and Damiri received three-year sentences and Soejarwo and Moes received five-year sentences. Guterres received a ten-year sentence in accordance with the statutory minimum requirement.

189. The *Soejarwo* judgement includes a discussion of several considerations which led the judges to derogate from the statutory minimum sentence, namely that the Rome Statute, upon which Act 26/2000 is based, does not provide for minimum sentences; that international judicial practice does not recognize minimum sentences; that the judge has the authority to assess the gravity of the crime in determining sentence; that the minimum sentences prescribed in Act 26/2000 were the subject of debate in society; that the responsibility of the defendant was one of neglect or omission rather than commission; and that the PERPU antecedent to Act 26/2000 provided for a five-year minimum sentence which should be considered according to the requirements of article 1(2) of the Indonesian Penal Code, which provides that “In case of alteration in the legislation after the date of commission of the act, the most favourable provisions for the accused shall apply”.

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[41] See Prosecutor v. Delalić (ICTY Trial Chamber), Decision on Motion for Provisional Release, 25 September 1996, para. 19.

[42] The same individual is also facing an outstanding SCU indictment.

190. The *Soares* judgement advances a more philosophical basis for the decision to derogate from the statutory minimum sentence, noting that judges are not "a mouthpiece of the Law"; that "sentencing is not merely to serve in establishing certainty or vengeance but instead to fulfil a sense of justice"; that a letter from the President of Timor-Leste read in Court indicates a "spirit of reconciliation that shall not be buried under a severe sentence for the Accused"; and that the Panel "endorses the reconciliation efforts currently underway without leaving a loophole for impunity".

191. The differing sentencing decisions create uncertainty and ambiguity and appear to be inconsistent with the spirit of Act 26/2000. The Commission takes the view that the role of judicial discretion in sentencing individuals for serious violations of human rights requires legislative clarification within the Indonesian legal system. In any event, judges must first rule properly on the legality or otherwise of any mandatory sentences before refusing to apply a prescribed minimum sentence with which they disagree.

192. The Attorney-General of the Republic of Indonesia accepts that there are weaknesses in Act 26/2000, primarily in the articulation of elements of crimes against humanity and provisions on sentence. He informs the Commission that there is indeed a need to amend these provisions.

D. Overview of investigations

1. Appointment and professional competence of the ad hoc Prosecutors

193. The Attorney-General explains that the procedures and appointment of ad hoc prosecutors were based on the eligibility criteria set out in article 23, paragraph 4 of act 26/2000. He was of the view that all the prosecution teams who had appeared before the Ad Hoc Court were adequately staffed and trained.

194. According to an organizational chart provided to the Commission, the Deputy Attorney-General for Serious Crimes acts as supervisor for the ad hoc prosecutors assigned to conduct trials before the Ad Hoc Court. The chart suggests that there is a Directorate on Gross Violations of Human Rights Affairs, which consists of sub-directorates for the investigation and prosecution of crimes against humanity. The Commission has been advised however, that the Directorate was established in early 2004 and that although the sub-directorates were specifically set up to deal with international crimes as such, in practice, the sub-directorates handle other types of crimes as well, and that few prosecutors and investigators work full-time on international crimes.

195. In relation to the training regime for investigators and ad hoc prosecutors, the Commission was informed by the Attorney-General that prosecutors and investigators have attended seminars and training sessions conducted by personnel of the ad hoc international tribunals, by the Indonesian Department of Law and Human Rights with the assistance of Asia Foundation and by local experts on human rights and criminal law. The Attorney-General said his office has access to expert advice on international criminal law and serious violations of human rights law, in accordance with the decision of the Attorney-General of the Republic of Indonesia dated 18 April 2000 on the Appointment of Fifteen Members of Expert Team on the Settlement of Serious

Rights Violations in East Timor. The Attorney-General advises that 15 prominent jurists have been selected for the expert team.

196. The Commission emphasizes however, that it cannot be independently verified as to whether the investigators and Ad Hoc prosecutors have received substantive legal advice from the expert team, for the investigations and conduct of trials before the Ad Hoc Court.

197. The Attorney-General has also confirmed that the investigations carried out by his office were sufficiently funded and resourced.

198. However, United Nations Trial Observers and NGO observers have consistently highlighted the lack of resources and facilities such as legal resource materials and internet connection which hindered the work of the Ad Hoc prosecutors; their limited training and knowledge in international criminal law, international humanitarian law or human rights law; their failure to frame their case appropriately in indictments; ineffective conduct of the trial and their failure to present adequate and available evidence in support of the prosecution's case. These observations will be discussed in further detail below.

2. Some observations on the indictments and legal theory of the Prosecution's case

199. According to international standards and jurisprudence on the form of indictments, an indictment should contain "a concise statement of the facts and the crime or crimes with which the accused is charged" which translates into an obligation on the part of the prosecution to state the material facts underpinning the charges in the indictment. Since the materiality of a particular fact cannot be determined in the abstract, the prosecution is also required to particularize the nature of an alleged criminal conduct of the accused whether it be by committing, aiding and abetting, planning, ordering or pursuant to the modes of liability of command responsibility.[43]

200. The Commission notes that the Attorney General's legal theory of the case against all 18 defendants is materially distinct from the theory proposed by KPP HAM and the SCU.

201. In the KPP HAM report, the inquiry team established there were "links" between the TNI and Indonesian security forces and concluded that it was "strongly assumed" that these entities had organized the violence carried out by the militias. The team further concluded that the violence in East Timor was organized and systematic and had occurred with the knowledge and/or complicity of the Indonesian military and security forces.

202. The Commission has observed marked divergences in the *Wiranto et al.* indictment and those prepared by the Attorney-General's Chamber, particularly in relation to the legal theories advanced, the presentation of material facts and the evidence linking the defendants to the perpetrators and the crimes. In the *Wiranto et al.* indictment, the prosecution highlighted the establishment of the militia groups with the assistance, financial and logistical support of the TNI commanders and personnel. This indictment referred to various meetings leading up the election

[43] *Kupreskić* Appeals Judgement, para 88 and *Krnojelac* Appeals Judgement, para 132. The contours of the Prosecution's case as set out in the Indictment comprise the "legal theory" of a case.

where there was a *plan* to target the pro-independence supporters and groups and to implement a scorched earth policy should the Timorese vote for independence.

203. In relation to the requirements of widespread or systematic attack, the *Wiranto et al.* indictment presented material facts supporting an attack on the civilian population during a first period from January 1999, following the announcement of the popular consultation, until 4 September 1999, the date of the announcement of the result. The second period followed the announcement of the results from 4 September 1999 through to October 1999. It was also alleged that the attack was part of an orchestrated campaign of violence, was carried out by the cooperative action of TNI soldiers and militia groups, predominantly targeted those believed to be independence supporters and that it was part of a policy to maintain East Timor under the authority of the Government of Indonesia.

204. In relation to the crime-base, particularly for most of the killings outlined, the prosecution was able to link the involvement, either direct or indirect, of the defendants and their subordinates with the militias in perpetrating the murders. In relation to deportation and forcible transfer, the prosecution outlined its case in some detail of a policy of forcible transfer by the TNI and the militia using military transport. For the crime of persecution as a crime against humanity, the prosecution outlined its case of discriminatory acts against those who were believed to be supporters of independence.

205. The materials facts supporting the crimes charged demonstrate a policy or plan on the part of the Government of Indonesia from January 1999, since the decision to hold the popular consultation was announced, to ensure that the pro-independence campaign was suppressed, though violent means, if necessary.

206. In relation to the individual responsibility of the accused Wiranto, the SCU alleged that due to his positions of authority in both the military and civilian structures, he possessed command responsibility over all branches and personnel of the Armed Forces of Indonesia, including over his co-defendants. The prosecution presented facts showing that Wiranto was kept informed of acts of violence being perpetrated by the TNI and militia, as he had made frequent visits to East Timor and was informed by reliable sources. It was alleged that he had failed to take necessary and reasonable measures to prevent or punish. The case against Wiranto is based on the theory of command responsibility.

207. The following table highlights crucial differences in the role and individual responsibility of the defendants charged in the *Wiranto et al.* indictment and the same defendants charged by the Attorney-General in Indonesia:

Defendant	Individual criminal responsibility in the Attorney-General's indictment	Individual criminal responsibility in the SCU indictment	Suspect in the KPP HAM Report
Wiranto	Not charged	Command responsibility	Yes
Adam Damiri	Command responsibility under Art 42(1)	Individual criminal responsibility under Section 14 as well as command responsibility under Section 16	Yes
Zacky Anwar Makarim	Not charged.	Individual criminal responsibility under Section 14 as well as command responsibility under Section 16	Yes
Kiki Syahnakri	Not charged	Individual criminal responsibility under Section 14 as well as command responsibility under Section 16	Not listed.
Tono Suratman	Command responsibility under Art 42(1)	Individual criminal responsibility under Section 14 as well as command responsibility under Section 16	Yes
Mohammed Noer Muis	Command responsibility under Art 42(1)	Command responsibility under Section 16	Yes
Yayat Sudrajat	Command responsibility under Art 42(1) and individual criminal responsibility under Art. 41 (attempting, plotting, or aiding)	Individual criminal responsibility under Section 14 as well as command responsibility under Section 16	Yes
Abilio Jose Osorio Soares	Command responsibility under Art 42(1)	Individual criminal responsibility under Section 14	Yes

Table 1

208. In relation to the indictments of the Attorney-General's Office before the Ad Hoc Court, the Commission has invited comments from the Attorney-General on the following specific questions:

- Were there diverging legal theories and/or assessments of evidence between Komnas HAM and the Attorney-General's Office? If so, what were the reasons for this divergence?

- Was there evidence tending to establish elements of crimes such as the existence of a widespread or systematic attack directed against a civilian population?

- Was there evidence tending to establish legal requirements of applicable modes of liability (e.g. planning, ordering, aiding and abetting, complicity) relevant to State actors, militia and/or other perpetrators? Was this evidence sufficient for indictment purposes?

- Did the Attorney-General's Office prosecution teams coordinate the legal theories to be presented in cases before the Ad Hoc Court?

209. The Attorney-General agreed that there was a divergence between his conclusion and that of Komnas HAM on the first question but added that all relevant evidence in support of the prosecution case was placed before the Ad Hoc Court. He confirmed there was sufficient evidence establishing the existence of widespread and systematic attack but that the investigations disclosed failure to prevent and/or punish on the part of the commanders.

210. As discussed above, in most of the indictments before the Ad Hoc Court (except for the *Suai* indictment), the accused were charged with "gross human rights violations" in accordance with a legal theory of command responsibility as the applicable mode of liability, as opposed to other forms of individual participation in crimes. However, in some instances, the material facts alleged were inconsistent with the theory advanced. The legal theories underpinning some of the indictments were also mutually incompatible.

211. For instance, in the *Suai* indictment, although it was alleged that the regent and district military commander had created, funded and trained militia groups, the defendants were not charged for this form of participation. In its report, KPP HAM alleged that one of the accused in the Suai case, Lt Sugito, participated in the burning and pillaging and that the attack by the militias, TNI and police on the Suai church was directly led by Herman Sudyono and Lt Sugito. They were not charged for this form of participation either. Although the *Guterres* indictment alleged that the accused had actively incited murder, it is predicated on the omission of the accused in failing to prevent, suppress or punish.

212. In the *Silaen* indictment, although the culpability of the accused was premised on command responsibility, he was described in the indictment as issuing orders to take appropriate actions during or after each violent incident. Silaen's instructions for investigations to be carried out appear to be incompatible with the theory of command responsibility, *unless* it was the

prosecution's case that Silaen's orders were insufficient to discharge his obligation as commander.[44] In any case, this theory was not articulated in the indictment.

213. The *Silaen* and *Damiri* indictments, although issued from the same prosecution office, alleged different legal theories and material facts. In the *Damiri* case, the indictment alleges that troops under Damiri's command committed crimes and that he did not take any proper and necessary action to prevent crimes or to take punitive measures. The indictment alleges that the militias committed attacks together with TNI personnel. The involvement of the TNI was omitted in the *Silaen* indictment. The discrepancy could be justified on the basis that *Silaen* was not responsible for the TNI, but only the police force, and thus acts committed by the TNI were not relevant to his liability. However, the Commission takes the view that material facts should be consistent across all related indictments. If the fundamental legal theory spanning the entire prosecution case was the involvement of the State apparatus, then this fact should have been pleaded in all indictments. The *Silaen* indictment also places emphasis on "spontaneous clashes" between two rival groups; this appears inconsistent with the *Damiri* indictment, where it was alleged that the crimes were committed by both militias and TNI in a coordinated and organized attack. The *Damiri* indictment identifies TNI personnel and commanders who had participated in the attacks.

214. As compared to the SCU indictments, the Attorney-General's Office indictments were prepared with a limited *locus delicti* (e.g. the incident at the Liquiça Church; the residence of Manuel Carrascalao in Dili, the Dili Diocese; the residence of Bishop Belo in Dili, Ave Maria Church complex in Suai, Kovalima) and *tempus delicti* (April and September 1999). The efficacy of Presidential Decree 96/2001 has been noted above.

215. It suffices for the Commission to note that the KPP HAM Report does not impose any similar temporal limitations. The Commission has been advised by Komnas HAM that there were more than 300 acts of gross violations alleged to have been committed by Indonesian armed forces which have not been processed by the Attorney-General's Office, though these have been documented in the KPP-HAM Report.

216. On the basis of the foregoing, the Commission concludes that the form of the indictments do not, in some instances, conform to international standards. The indictments, which essentially encapsulate the case for the prosecution, were formulated in an unnecessarily restrictive manner. The modes of liability advanced in the indictments tended to minimize the defendants' culpability and alternative forms of participation in offences were not considered or pleaded. The Commission finds that there was no consistency or coordination in the presentation of the prosecution case at trial and no rational explanation for the diverging approaches and legal theories.

3. Adequacy of the investigations

217. In light of the diverging case theories outlined above, the Commission has inquired about the level of cooperation between the parallel judicial processes in Timor-Leste and Indonesia,

[44] This was the Prosecution's legal theory in the case of *Prosecutor* v. *Halilović*, Case No IT-01-48-I, (ICTY), Indictment, 10 September 2001.

and whether the Attorney-General's Office has received any assistance from UNTAET, and in particular the SCU.

218. The General Prosecutor and SCU staff explained that the SCU did make available its case files for the use of the investigators of the Attorney-General's Office, but it would appear that the investigators Attorney-General's Office had declined to utilize most of the materials offered. The SCU staff explained that officers from the Attorney-General's Office came to Timor-Leste for about 10 days and interviewed about 30 witnesses. SCU staff expressed astonishment at the eventual selection of witnesses requested to testify before the Ad Hoc Court, as material witnesses who could have testified to inter alia, the involvement of the TNI and state security forces were not selected.

219. In Part 2 of its report, KPP HAM drew upon documentary evidence to conclude that there were links between the civil and military government apparatus and armed groups (militias). It relied on various reports that pro-integration militia units were supported (recruited, trained and funded) by the TNI, and in particular Kopassus. KPP HAM also highlighted other links such as TNI membership in a militia group, Aitarak. KPP HAM also relied on the testimony of the former Regent (*Bupati*) of Almara who revealed that the one who was responsible for the militia field operations was General Zacky Anwar Makarim. He also testified as to the weapons used by the militias, which were issued by the TNI.

220. The Commission is therefore of the view that there was sufficient basis for the Attorney-General's Office to pursue a line of inquiry to determine whether the TNI or other security forces were directly involved in the events in 1999, either by relying on the testimony already available or by seeking further information from these individuals, including General Zacky Anwar Makarim, for example, on the storage of weapons in TNI military barracks.

221. It is also not clear to the Commission whether the Attorney-General's Office investigators had pursued a line of inquiry to determine whether individuals in the Government or military were directly involved in the events in 1999. The Commission has sought the following clarification from the Attorney-General in this regard:

- Apart from the individuals indicted by the Attorney-General's Office, did follow-up investigations provide evidence linking the other suspects listed in the KPP HAM Report to the crimes committed?

- Did the Attorney-General's Office discover enough further evidence to discard KPP HAM's theory that State actors were involved in the crimes?

- Based on the evidence available to the Attorney-General's Office, was it the most reasonable inference that the violence in East Timor in 1999 occurred spontaneously, without organization and planning by the TNI?

- Did the Attorney-General's Office question Major General Zacky Anwar Makarim regarding the allegations made against him in the KPP HAM Report concerning his involvement with the militias?

222. In relation to the first question, the Attorney-General responded that there was sufficient evidence linking other East Timorese suspects to the crimes but the Attorney-General's Office could not establish their whereabouts. The Commission accordingly concludes that the Attorney-General was not able to obtain sufficient evidence linking other suspects such as General Wiranto, Major-General Zacky Anwar Ibrahim, a suspect who was a Lieutenant-General, another who was a Major-General and others, despite the findings and recommendations of KPP-HAM. The Attorney-General states that the investigations established that the TNI was not involved in the planning and organisation of the crimes and but only that the military commanders in charge of East Timor did not perform their duties adequately in dealing with the crimes committed in 1999.

223. However, KPP HAM concluded that, based on the evidence highlighted in its report, there were strong connections and linkages between the TNI, the Indonesian Police and the civil bureaucracy, and that the violence in Timor-Leste in 1999 was not caused by civil war but the result of a systematic course of violence carried out by the militia with the support of the TNI and the Indonesian police. The KPP HAM report was cautious, however, as to whether the TNI and police organized the violence, preferring to conclude that the responsibility of the TNI and police was "strongly assumed". The report also mentions that the TNI, the Indonesian Police and civil officials have *denied* their links with the militia groups.[45]

224. In relation to the scope of the investigations and indictments, the Attorney-General has focused on murder and assault and has excluded prosecution of other serious crimes against humanity documented in the KPP HAM report. In particular, numerous allegations of torture, rape and sexual violence, forcible transfer and deportation of civilians and destruction of public property were not pursued.[46] The murder case of the Dutch journalist Sander Thones, allegedly by a TNI Battalion, was also dropped. Some of these cases could have been presented as part of a widespread and systematic attack falling outside the months of April and September, but that approach was not pursued. This truncated approach has resulted in a failure to reflect the totality of a defendant's criminal conduct and culpability.

225. Regarding the systematic character of the attacks directed against the civilian population, KPP HAM prepared a chart on the frequency of incidents of human rights violation, attempting to demonstrate a systematic attack between January and December 1999. Although certain months (e.g. April and September 1999) reveal a more distinct and convincing pattern of systematic attacks, the overall pattern of the serious violations in the course of one year, without further evidence, may not necessarily support a legal finding of a "systematic" attack.

226. However, the mass and enforced evacuation of Timorese into the territory of Nusa Tenggara (West Timor) in January and September demonstrated *prima facie* evidence of

[45] This is particularly relevant as most of the prosecution witnesses were members of the TNI, as discussed below.
[46] Many of these crimes were investigated and pursued by the SCU and Special Panels.

systematic planning. This conclusion is strengthened by evidence of crimes that occurred in this context, along with other forms of attack such as razing, looting and destruction of property. The KPP HAM report establishes there was a scorched earth policy in place, and destruction and looting of civilian property and objects after the announcement of the ballot results. KPP HAM attempted to explain the absence of systematic attacks during several months by showing that the intensity of violence paralleled the emergence of new political and security policies at various times. The Commission concludes that there is insufficient evidence to substantiate the correlation between the emergence of political and security policies and the absence of systematic attacks.

227. The KPP HAM report lists members of the TNI and other civilian structures, and a summary of their involvement to support the conclusion that the violence in East Timor was organized and systematic, and had occurred with the complicity and/or knowledge of high-level individuals within the TNI.

228. The KPP HAM report is significant to the Commission's assessment of the trials before the Ad Hoc Court, but not necessarily to the trials before the Special Panels. The most fundamental divergence lies in the case theories of the Attorney-General's Office and the SCU. The Commission notes that the indictments issued by the Attorney-General's Office tend to characterize the events in 1999 as a civil conflict or as spontaneous acts of violence between rival pro-independence and pro-integration groups, whereas the SCU and Special Panels have established that the crimes in East Timor were committed as part of a widespread and systematic attack, organized and planned by the TNI and other State apparatus.

229. The KPP HAM report provides sufficient indication of military involvement at certain times (e.g. in April and September 1999) and that the alleged perpetrators acted with the knowledge that their acts formed part of a widespread or systematic attack against a civilian population for the Attorney-General's Office to have at least conducted further investigations, particularly with regard to the role of the TNI in the crimes committed by the militias. In particular, the KPP HAM report clarifies that it was only able to present a portion of the human rights violations that had occurred in Timor-Leste as a result of various time limitations, conditions and inaccessibility to evidence. Such a statement provides a further indication to the Attorney-General's Office that additional investigation should be pursued to expand the crime base and link evidence, if required. It is also noted that under article 22 of Act 26/2000, the Attorney-General's Office is permitted to complete its investigations for a maximum period of 240 days.

230. It has been suggested that the Attorney-General's Office appears to have pursued indictments charging a specific mode of liability to evade investigations into possible State involvement in crimes. The Commission cannot concur with this view. The reliance on command responsibility in itself is not sufficient evidence of evasion of a more culpable form of responsibility as it has been used at the ad hoc international tribunals as an *alternative* mode of liability and at times the only mode of liability, and that the position of command responsibility may be considered as an aggravating factor for sentencing purposes.[47] It is generally viewed as a "lesser" means of attracting liability resorted to only in instances where the prosecution is not

[47] *Delalic* Appeal Judgement, para 745.

able to prove a more direct mode of participation such as commission, planning, instigation, ordering and aiding and abetting.

231. The Commission has not been able to ascertain from the Attorney-General's Office's responses as to why its investigators and prosecutors were not able to pursue a more direct form of liability or involvement when there were obvious lines of investigations provided by the KPP HAM report and the materials from the SCU. Moreover, command responsibility in the indictments issued by the Attorney-General's Office's has generally been characterized in one of two ways. First, the defendant's subordinates committed crimes for which the defendant is liable and second, even if they did not, the defendant failed to prevent *others* from committing crimes. As discussed below, the alleged involvement of the accused in the crimes committed in 1999 *as set out in the Attorney-General's Office's indictments* was minimal and at times, ambiguous, and in most cases, resulted in the acquittal of the accused. An ad hoc judge has opined that the indictments were far from satisfactory and that a pre-trial indictment review facility is required.

232. The following analysis[48] demonstrates the material divergences between the results of the investigations of the Attorney-General's Office and the KPP HAM report:

	CASE OF THE ATTORNEY-GENERAL	**REPORT OF KPP HAM**
Patterns of crimes		Mass murder Torture and persecution Forced disappearance Sexual enslavement and rape Scorched-earth operation Forced displacement and deportation Destruction and loss of evidence
Occurrences of crime	4 incidents: The Liquisa massacre The attack on Suai Church The attack on Manuel Carrascalao's house The attack on Bishop Belo's house	16 primary cases, although not limited to them (as explained above)
Crime scene	3 locations/regencies: Suai (Kovalima) Dili Liquisa	All the 13 regencies of East Timor
Alleged perpetrators	16 individuals	More than 100 individuals, including those that allegedly executed the crimes directly, as well as the Indonesian High Command
Time frame	April and September 1999	January to September 1999

Table 2

48 Based on David Cohen's report, "Intended to Fail".

233. The Commission concludes that in limiting its investigations and presentation of its case in this restricted fashion, the ad hoc judicial process was not able to portray an accurate and complete historical record of events in 1999. In particular, the scale, widespread nature and systematic nature of the attacks against the population were not thoroughly explored as the temporal mandate was restricted to April and September 1999. There was little discussion of the emergence of militias and the historical relationship between the Indonesian State and the paramilitary and civilian militias. The full culpability and criminal conduct of those involved in the perpetration of the crimes were not recorded in the trial proceedings. There was also was little elucidation of the organizational structure, chain of command and control, plan and policy of the security forces that were involved in the events of 1999.

E. Overview of the trial proceedings

234. In determining the judicial efficacy of the proceedings before the Ad Hoc Court, the Commission has analysed available parts of the trial record, including indictments, closing submissions and judgements, for all the cases heard before the Ad Hoc Court. However, the Commission has selected for discussion certain cases as broadly representative of these judicial proceedings. The Commission has also considered the availability of detailed reports prepared by United Nations observers and United Nations staff who were able to interact with the ad hoc prosecutors and observe the proceedings. The Commission emphasizes that its analysis is concerned with the *judicial process* and not necessarily *the results*. On the basis of its analysis, the Commission has sought to identify key areas where there is a reasonable basis to conclude that the judicial process did not meet international standards.

1. Appointment and professional competence of Judges of the Ad Hoc Court

235. The Bench of the Ad Hoc Court is composed of two career judges and three Ad Hoc judges. The Ad Hoc judges are appointed to the Human Rights Court and the Court of Appeal by the President on the recommendation of the Chief Justice of the Supreme Court. In the case of an appeal to the Supreme Court, Ad Hoc judges are appointed by the President on the recommendations of the National Parliament (*Dewan Perwakilan Rakyat*, DPR). The Ad Hoc judges are selected from the academic field and serve for five years, renewable for a second term.

236. In the course of a mission to Indonesia in July 2002, the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, reported that a number of judges had indicated that they had received very little training on international standards and international practice relevant for the prosecution of serious crimes such as crimes against humanity and genocide (see E/CN.4/2003/65/Add.2).

237. A United Nations Trial Observer at the Ad Hoc Court noted that the career judges were not relieved from their docket of cases to focus on human rights trials, resulting in lack of preparation time. The expertise of the judges also varied. Some judges in the *Soares, Damiri and Guterres* cases were more oriented towards applying international criminal law; and judges with strong academic backgrounds stood out. In contrast, there were judges who were inclined to treat the crimes before them as ordinary criminal offences and apply Indonesian substantive and

procedural laws. The Commission notes however that although international jurisprudence could have been referred to, for instance, in relation to admissibility of evidence, the Ad Hoc Court is required to apply Indonesian rules of procedure and evidence.[49]

238. The Commission has also benefited from the observations of an ad hoc judge and a study conducted by ELSAM[50] on the administrative problems faced by the Ad Hoc Court judges. ELSAM noted that from the total number of judges, 17 judges served as a member of a panel in more than one dossier. These judges also had to juggle judicial duties in relation to regular criminal and civil trials, resulting in inadequate preparation for assigned Ad Hoc trials or delays and postponement of trials. It was also observed that these judges lacked judicial and legal support services, research facilities such as a library, computers and Internet access and adequate security services.

239. Until recently, the judiciary was subject to the Supreme Court for its judicial functions, but to the Ministry of Justice for its organization, administration and finances, a situation that according to some commentators has led to the "politicization" of the judiciary.[51]

240. It is also pertinent to highlight some of the findings of the Special Rapporteur on the independence of judges and lawyers. The Commission finds the following observations to be relevant at the time of the mission of the Special Rapporteur to Indonesia, which also coincides with the period encompassing investigations and trials of eighteen defendants before the Ad Hoc Court:

- That the Ministry of Justice exercises excessive power in the appointment, transfer and discipline of judges, increasing the likelihood of judges beholden to the Ministry;

- That concerns have been raised about the test for appointment to the Supreme Court; for instance, that there was insufficient inquiry into a candidate's track record and that subjective criteria was used for selection;

- That there is no systematic publication of court proceedings and publications; for instance, all proceedings before the Supreme Court are held in closed session and rarely produce a written judgement ;

- That concerns have been expressed at the lack of an effective accountability mechanism to oversee the conduct of judges, although there has been legal reform removing the status of judges as civil servants;

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[49] Article 10 of Act 26/2000, unless other procedures are provided in the Act itself.

[50] ELSAM Progress Report VII, October 2002.

[51] In 1999, the International Commission of Jurists (ICJ) released a report on the state of the judiciary and human rights in Indonesia entitled "Ruler's Law". The report finds that the judiciary remains an arm of executive government and concluded that "…The Minister of Justice controls all matters relating to judges. The Supreme Court can exercise no effective control over executive and legislative action. Compounding the dilemma is the absence of adequate mechanisms to call judges to account. The new government and parliament must restore confidence in the judiciary by initiating needed reform." The report advocates the establishment of a new Constitutional Court and argues for a clear division of responsibility between the Ministry of Justice and the courts.

- That there have been a number of reports issued by various Indonesian organizations alleging widespread and systematic corruption within the administration of justice system;

- That corruption is not specific to the judiciary but affects the Indonesian bureaucracy as a whole, including the police and prosecution service;

- That the Government has plans to reform the judicial and legal reform programmes; for instance, the five-year National Development Plan identified some of the problems that required resolution;

- That there is a lack of independent, impartial, clean and professional courts due to Government and other influences, as well as the lack of quality, professionalism and morality of the law enforcement apparatus;

- That there is a lack of public confidence in the courts;

- That a large number of cases of corruption, collusion and nepotism and human rights cases are still outstanding.

241. Notwithstanding these observations, the Commission finds that the Republic of Indonesia was moving forward and making considerable progress in achieving respect for human rights and strengthening the rule of law. The Commission refers to several constitutional amendments which are progressive and encouraging. First, an amendment in August 2003 to the Constitution establishes a new Constitutional Court with jurisdiction to enforce fundamental human rights provisions enshrined in the Constitution. A more significant amendment was to bring about a total separation of the judiciary from the executive component of the Government. This would allow the Chief Justice to have sole authority and control of the entire judicial system in the country. Moreover, the Commission welcomes the Government's decision to embark upon a five-year plan of action for the advancement of human rights and to ratify all the major human rights treaties and conventions.[52] The Government of Indonesia deserves full acknowledgement for these progressive reforms.

242. It is with this general background in mind that the Commission evaluates the trial proceedings before the Ad Hoc Court in order to identify several other critical obstacles and difficulties facing this judicial process.

2. Inadequate presentation of the prosecution case

243. The Commission will first assess the adequacy of the prosecution case in terms of presentation of credible and relevant evidence demonstrating a genuine attempt to discharge its

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[52] To date, Indonesia has ratified the International Convention on the Elimination of All Forms of Racial Discrimination; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child and International Convention on the Protection of the Rights of All Migrant Workers and members of Their Families.

obligations under the law and in accordance with international standards. The Commission will also consider whether the prosecution presented its case in an objective and fair manner.

244. The Commission is compelled to comment on the inadequate presentation of sufficiently relevant, inculpatory evidence in support of the charges in most of the trials analysed by the Commission. A pattern emerges from an analysis of the trials, characterized by manifestly insufficient investigative steps in light of potentially available steps;[53] the number of cases pursued in proportion to the number of alleged incidents in the KPP-HAM Report; and a consistently misleading characterization of the overall situation in Timor-Leste at the material time, e.g. avoiding reference to obvious evidence of State involvement and obvious departures from normal rules of procedure and evidence.

245. Notably, there was available documentary evidence that could have demonstrated the involvement or linkage of State agents with the crimes, but not presented by the prosecution.[54] Article 48(1) of the Code of Criminal Procedure requires that a document that has been assessed by the investigator and is relevant to the case at trial should be attached to the dossier or BAP. ELSAM has undertaken a study to demonstrate that there were numerous pieces of documentary evidence in the KPP HAM final report that were not attached to the BAP of the Ad Hoc cases. Some of the KPP HAM documents were used during the trials, such as the Lumintang telegramme, which contains instructions on how to deal with the situation in East Timor, including use of repressive/coercive measures as well as evacuation (forcible transfer) of Timorese.[55] Some of these documents clarify the connection between militias and regional government, TNI and police forces and some documents substantiate the role of State institutions in the training and funding of the activities of the militias. The Commission recalls that in Part 2 of its report, KPP HAM drew upon documentary evidence to conclude that there were links between the civil and military State apparatus and armed groups (militias). KPP HAM relied on various reports that pro-integration militia units were supported (recruited, trained and funded) by the TNI and in particular Kopassus.

246. In addition, the Commission is struck by the choice of witnesses summoned by the prosecution *in support* of its case. There was generally a discernible disparity in the ratio of victim-witnesses and non-victim witnesses.[56] In a number of these trials, the prosecution called as witnesses, individuals who were either members of the TNI or Government officials. Some of these witnesses had been indicted by the Attorney-General's Office and it was obvious that they could not provide evidence substantially relevant to the prosecution's case. For instance, in the *Soares* case, seven of the prosecution witnesses were indicted by the Attorney-General. Trial Observers have also highlighted many instances where witnesses changed their evidence in court

[53] For instance, the *Abilio Soares* case did not contain any victim-witnesses pre-trial statements in the investigation file or "BAP" (*Berita Acara Pemeriksaan)*.

[54] The ICTJ Report "Intended to Fail" by David Cohen provides a comprehensive list of documentary evidence that was available but not produced at the trial of Noer Muis which comprised decrees, instructions and communications from national and provisional level government officials, communications between military commanders, TNI situation reports, and a list of firearms held by the militia. David Cohen also highlighted an interview with the prosecutor in the Endar Priyanto case who told Cohen he was not able to confirm the direct involvement of TNI because he was not aware that the KPP HAM report had documented such evidence.

[55] This document was used in a civil suit in *Doe* v. *Lumintang* in the United States District Courts.

[56] In the Noer Muis case it was 5: 9; in the Soedjarwo case, it was 1: 8; in Tono Suratman, it was 1: 9; in Kuswani et al it was 2:11 and in Priyanto case it was 1:9.

on material aspects with little challenge or repercussions from the prosecution.[57] In the *Suai* case, the judges felt compelled to reject evidence of witnesses who had changed their testimony, calling them "untruthful".

247. A United Nations Trial Observer stated that in some of the trials, the preponderance of exculpatory evidence and witnesses' statements were consistent with the Indonesian authorities' official version of the causes of the violence in Timor-Leste after the popular consultation. These witnesses generally corroborated the defence that there was a general breakdown of Government authority and control after the announcement of the independent vote and the arrival of foreign power on Indonesian territory. They claimed that the violence and destruction that occurred after the vote was a spontaneous reaction to "fraud" perpetrated by the United Nations. As a result, the defence theory was often presented through witnesses called by the prosecution and not consistent with the prosecution's own legal theory as set out in the indictment.

248. The *Silaen* case is a relevant illustration. In *Silaen*, indictees such as General Wiranto, Adam Damiri, Noer Muis and Hulman Gultom testified as witnesses. Most of these witnesses described the events in East Timor as spontaneous occurrences or clashes between the two groups who were provoked into attacking each other. They also attributed the clashes to alleged "fraud" on the part of UNAMET. The witnesses also testified that they were fully aware of the situation and described measures taken to prevent an escalation of the conflict or chaos and bring to justice those who had committed crimes. This included evacuation of refugees to protect them. This was essentially the case for the prosecution in relation to the background facts and role of the Indonesian security and military forces. The few victim-witnesses who testified, such as João Pereira, told the Panel that the security forces took no action in relation to the incident at the Liquiça Church and even appeared to allow the incident to occur and did not disarm the militias. An absent victim's statement was read in court wherein he stated that the security apparatus – TNI, Brimob or the police – were always together with the armed militias. Two other statements of Timorese victims were read out in their absence. These witnesses testified to the commission of crimes by the militias and State security apparatus and TNI, and their involvement with the militias.

249. On the other hand, the defence presented adequate evidence tending to support the defence legal theory and to exonerate the accused.

250. Although command responsibility was the relevant mode of liability alleged in the case of *Silaen*, the only relevant evidence presented was the failure of the accused to investigate whether persons serving under him had participated in the commission of crimes. There was no attempt by the prosecution to show effective control or superior-subordinate relationship between *Silaen* and the individuals who perpetrated the crimes, i.e. the militias. It has been observed that the prosecution's closing submission on widespread and systematic attack was not relevant- that the attack was attributed to the Government's policy of permitting an independence vote that resulted in the commission of uncontrollable criminal acts by the two sides, in which security forces were also involved. The prosecution did not advance arguments that the Government intended the violent consequences or that the violence was a direct result of Government policy.

[57] Susannah Linton, "Indonesian Ad Hoc Court for Human Rights Violations".

251. The Commission finds that the case against *Silaen* appears curiously one-sided and that the legal and factual premises upon which his liability is based are inadequate and lacking in credibility. Evidence adduced to establish the involvement of military and security forces was lost and largely incompatible with the prosecution's presentation of the case.

252. In the *Damiri* case, the prosecution presented the evidence of three Timorese victim-witnesses, including evidence from Bishop Belo and Manuel Carrascalao. Their testimony on the involvement of TNI in the crimes was largely contradicted by TNI witnesses called by the prosecution, such as Kiki Syahnakri, Anwar Makarim, Tono Suratman and Noer Muis.

253. The Commission has taken into consideration that the trials before the Ad Hoc Courts functioned within an essentially civil law system where all evidence, for or against the prosecution, is investigated and presented before the court in a dossier. However, the prosecution is also expected to adduce sufficient evidence in support of the charges laid and to establish which evidence it finds reliable and relies upon and which it does not.

254. The Commission concludes that there was a large pool of available witnesses - eye-witnesses, survivors and victims of the charged incidents; journalists; United Nations staff, and other international observers who were present in East Timor at the material time, based on which a credible and accurate case could be constructed. Komnas HAM pointed out that the Attorney-General had failed to call material witnesses identified in the KPP-HAM Report who could have provided inculpatory evidence. Inexplicably, the prosecution chose to found its case on the testimony of witnesses who had a clear interest in exonerating the defendants.

255. In *Damiri*, the Panel of Judges also expressed concern with the conduct of the *ad hoc* Prosecutor, who had asked for an acquittal at the conclusion of the trial. The Panel disagreed with the submission of the Ad Hoc Public Prosecutor because his position was "not accurate, inconsistent and did not follow the rules of indictments." In particular, the judges noted that the Ad Hoc Public Prosecutor did not consider the testimony of an expert witness; that although the Public Prosecutor requested an acquittal, he had made submissions on matters that implicated the defendant; that the Ad Hoc Public Prosecutor declared that the indictment would not influence the TNI community, especially the defendant, Damiri, noting that "The court was not a form of revenge and was not carried out for the benefit of, or under the pressures of certain parties ...." The Panel concluded that this was a distinctly unusual statement to be made in a submission for acquittal.

256. As illustrated in the preceding section, the prosecution was also not actively involved in the trial proceedings to defend the charges and to protect its case, and did not intervene to ensure that the trial proceedings took place in a fair and professional manner. According to United Nations Trial Observers, in the *Suratman* case, the defendant was represented by nine counsel (including three TNI members)as compared to the two prosecuting counsel. The Ad Hoc Prosecutor's questions addressed to one of the victim-witnesses lasted for three minutes, whereas the witness was questioned by the defence and the judges for about four hours. It was observed that the prosecutor did not provide the witness with an opportunity to present evidence in a coherent and adequate manner, appeared ill-prepared and disinterested and remained impassive throughout the cross-examination, even when there were occasions when he could have intervened to protect the rights of the witness.

257. In the *Suratman* appeal, the prosecution failed to attach the prosecution appeal brief against acquittal to the appeal papers filed before the Supreme Court, resulting in the outright dismissal of the appeal on procedural grounds. The Commission is not able to verify the exact reason(s) for this omission, but noted that the Attorney-General was concerned enough to summon the Ad Hoc Prosecutor seized of the case, Simangunsong, for questioning. The Attorney-General has acknowledged the negligence of the Ad Hoc Prosecutor but noted that since Simangunsong had already retired, the Attorney-General's Office could not sanction him.

258. The Commission concludes that the prosecution appeared uncommitted to proving the guilt of the accused insofar as much of the prosecution evidence contradicted the findings of the KPP HAM report, which served as a basis for the prosecutions before the Ad Hoc Court.

259. There has been adequate credible documentation on the organizational culture of the Public Prosecution Service and Attorney-General's Office for the Commission to express concern over the "politicization" and "militarization" of the prosecution service and the lack of political will, support and encouragement from the higher echelons to seriously and credibly pursue human rights prosecutions.[58] A former senior prosecutor of the SCU has advised the Commission that some Ad Hoc Prosecutors had admitted that they did not have the expertise and experience to prosecute human rights cases, and had welcomed assistance from international advisers, but had received little support and encouragement from the Attorney-General's Office in this regard.

260. The Commission concludes that the failure of the judicial process in Jakarta can be primarily attributed to the inadequate professionalism of the prosecutors, marked by an apathetic presentation of the prosecution's case in court and a lack of commitment to rigorously pursue truth and accountability for those responsible for serious violations of human rights committed in Timor-Leste in 1999.

3. Adequacy of witness protection and general court room atmosphere

261. The treatment and lack of adequate protection measures for witnesses and victims have been well documented in several reports by United Nations Trial Observers' and NGOs. Most of these observations have been substantiated from the Commission's personal interviews with relevant individuals. Their observations may be summarized as follows:

- That at the early stages of the trial process, there was an atmosphere of intimidation and lack of protection for witnesses. For instance, the accused Guterres was permitted to sit next to the witness testifying in the trial of another defendant. The witness waiting room in the courts was also accessible to members of the public;

- There was a lack of adequate and effective protective measures, such as physical screening and in camera proceedings, where the identity of the witness is protected from the public;

[58] See, inter alia, David Cohen, "Intended to fail"; Susannah Linton, "Unravelling the first three trials at Indonesian Ad Hoc Court for Human Rights Violation in East Timor"; and Open Society Institute and the Coalition for International Justice, "Unfulfilled promises, Achieving Justice for Crimes against humanity in East Timor."

- The Government regulation on witness protection has not been elaborated in legislative form and has not been incorporated into the laws of Indonesia (such as the Code of Criminal Procedure);

- There does not appear to be a witness protection unit in POLRI and the system for witness protection appeared haphazard and unprofessional. For instance, a witness “safe house” bore a sign outside declaring it to be so. There was also cause for witnesses to fear for their security, for instance as members of the militia group BMP (*Besih Merah Putih*) and TNI soldiers, wearing uniforms and sometimes carrying weapons, were permitted to attend court proceedings in large numbers;

- The lack of judicial decorum on the part of some of the judges during court proceeding. The treatment of witnesses, particularly those from Timor-Leste, was insensitive and at times disrespectful, as illustrated below;

- Witnesses were questioned for hours by judges, prosecutors and defence counsel without a break or refreshment;

- Witnesses felt intimidated in court, expressed concerns at the security lapses in court and were reluctant to return to testify unless changes were made.

262. The Commission will highlight some instances to illustrate the above concerns. In the *Tono Suratman* case, as a result of an attack on the house of Manuel Carrascalao, a witness lost substantial use of his arm, which rendered him unable to raise his arm to take the oath. Members of the prosecution, defence and public gallery laughed loudly at the witness when he explained his disability. During the trial, there were around 30 Kopassus officers who had arrived *en masse* by bus, having been ordered to attend by roster. The hearing was publicly recorded by TV crews and journalists, who were taking photographs of the victim and his injuries as he gave evidence.

263. In a hearing at the trial of *Endar Priyanto*, it was observed that the suspect was allowed to approach a witness during his cross-examination. The witness was asked to remove his shirt to display his injuries, journalists present took photographs of the victim and it was observed that the general demeanour of the prosecutors, judges and defence counsel was hostile and aggressive. The witness was at times ridiculed and made the brunt of private jokes among members of the bench or the defence.

264. The Commission notes that grave concerns have been raised in relation to the performance of some of the judges. Some of them also failed to control the court proceedings in an appropriate manner, and to ensure that witnesses’ rights were being respected.

265. The experience of witness Dominggas dos Santos Mouzinho, who testified about the Suai Church massacre, is illustrative. The Prosecution had applied for a Tetum interpreter to assist the witness.[59] The presiding judge ruled against it, on grounds that the interpreter was not

[59] Article 177 of the Code of Criminal Procedure requires the court to appoint an interpreter if the witness does not understand Bahasa Indonesia.

accredited and that he was satisfied that the witness was conversant in Bahasa Indonesia. This witness was questioned for about five hours without a break. Trial observers were consistent in their views that it was evident that the witness had difficulties understanding Bahasa Indonesia. The following reflects just one of a series of questions which the Panel and prosecution permitted the defence to pursue without any objection:

> Q: Your children, did they actively follow [sic] as officials in the referendum, were there children of yours who followed?
>
> A: Followed.
>
> Q: ..so your children were with UNAMET? True Madam? True Madam, yes your children were chummy with UNAMET?
>
> A: (No answer.)
>
> Q: Your daughter named Fatimah is working, can you tell me or you may remember when she started to work? When did she start to work in Dili, can you remember madam, when? Six months ago, one month ago or when? Try and explain to me when Fatimah started to work?
>
> A: (No answer.)
>
> Q: Fatimah was working when you examined two years ago, before you became a witness or after you became a witness, madam? Witness first or Fatimah worked first?
>
> A: (No answer.)
>
> Q: Madam can choose not to reply. This really is a “sham court”, political court. False testimony, madam in Indonesia, is punishable by seven years…Sorry, but this concerns four TNI officers and police, their fate is to be accused. Beloved madam, I beg your honesty, Fatimah worked before you became a witness or after you became a witness? Don’t look at the *bule* [white foreigner] on your right, I know he has been coaching you. Look at me if you need to, look at the judge, just listen, no need for coaching. Beloved madam, was Fatimah working after you become a witness or before you become a witness?
>
> A: (No answer.)
>
> Q Thank you, if you don’t want to respond, I won’t force you. But follow the conscience of your heart, my most beloved madam, were your daughters raped or about to be raped/wanting to be raped (diperkosa atau mau diperkosa?)….
>
> A: (No answer.)[60]

[60] Adapted from Suzannah Linton’s “Unravelling the first three trials at Indonesian Ad Hoc Court for Human Rights Violation in East Timor”;

266. The Commission finds this line of questioning improper, intimidating and confusing. The question relating to her daughters were not understood by the witness as the words "*mau diperkosa*" literally mean "want to be raped", but are understood in Bahasa Indonesia to mean "about to be raped". The witness later explained to United Nations personnel that she could not understand the questions, which was why she had remained silent, that she had felt harassed and intimidated and that it was unlikely that she would return to testify.

267. In relation to a witness testifying in the *Tono Suratman* case, the judges were observed to have assumed a line of questioning designed to discredit the witness; their general demeanour suggested that they did not take the witness seriously. In the hearings in October, the defence was observed to have questioned the witness in a condescending and rude manner, and it was only on one occasion that the Chief Justice ruled on the antagonistic questioning style of the defence counsel.

268. However, it cannot be said that all Timorese witnesses were fully cooperating with the Jakarta prosecutors. Bishop Belo, among the most prominent material witnesses, refused to respond to summons to attend court. Members of the community meeting the Commission in Dili indicated that they were also largely influenced by the experiences of other witnesses and labour under a general perception that there were security risks if witnesses agree to testify in Jakarta. Moreover, recording evidence via videoconference was not explicitly provided for under Indonesian laws and was made available to witnesses at a very late stage of the proceedings before the Ad Hoc Court. These facilities were eventually funded by a donor State and operated by the SCU, specifically to address security concerns and to afford an opportunity to Timorese witnesses to participate in proceedings before the Ad Hoc Court.

269. The Commission concludes that the existing protection regime for victims and witnesses is manifestly inadequate. Some of the protective measures the Government of Indonesia should implement include:

i. Codification of a comprehensive range of protective measures in accordance with internationally accepted standards and include them in the Code of Criminal Procedure;

ii. Establishment of an adequately staffed Victims and Witnesses Unit to provide support services such as counselling, information on the Indonesian judicial procedure, victims' rights and entitlements under Indonesian laws;

iii. Ensuring that victims/witnesses are placed in a secured environment before and after testifying in court;

iv. Providing training to investigators, prosecutors and judges on dealing with victims/witnesses;

v. Installation of facilities in the court-rooms to comply with any legislation on protective measures.

270. A United Nations Trial Observer noted that although the order and atmosphere in the courtroom had generally improved since the initial phases of the trials, there were disturbances within the courtroom by members of the military. For instance, in the *Daimiri* case, a member of the TNI threatened one of the judges with death for convicting the accused. An ad hoc judge has confirmed that some of the judges have also received threats outside the court-room.

271. The Commission concludes that the judicial process before the Ad Hoc Court was not sufficiently equipped in terms of providing protective measures and facilities for victims and witnesses. There was inadequate infrastructure and logistics to ensure the non-disclosure of the identity of a victim or witness who may be in danger or at risk until the victim or witness is brought to court. Moreover, it is well documented that pressure tactics were openly being used during the trial proceedings to intimidate witnesses and judges.

4. Review of the Trial Judgements

272. The Commission will now proceed with an analysis of certain trial judgements of the Ad Hoc Court, in light of applicable international standards, primarily to ascertain whether the Panels of Judges have provided a sufficiently reasoned opinion for their verdicts.

273. Civil law systems accord a wide margin of discretion to judges in assessing evidence, according to the principle of "intimate conviction" (*intimé conviction*).[61] However, both civil law and common law jurisdictions tend to address the potential deficiencies of eyewitness testimony through an extended duty on trial courts to articulate reasons for their assessment of evidence.[62] Under Indonesian law, the judges are bound to comply with the admissibility provisions of articles 183 and 184(1) of the Code of Criminal Procedure.

274. The Commission will also determine if the factual and legal findings in the judgements are such that that no reasonable tribunal could make these findings and whether the evaluation of the evidence is wholly erroneous, bearing in mind that it is entirely possible that two triers of fact might reach different but equally reasonable conclusions.

275. The Commission has outlined established jurisprudence in relation to the essential elements of crimes against humanity to provide an analytical framework for its review of the judgements:

(a) In relation to the legal requirements of an "attack", the phrase has been interpreted as encompassing five elements – there must be an attack; the acts of the perpetrators must

[61] See § 258 2 Strafprozessordnung (Austria); § 261 Strafprozessordnung (Germany); Art. 192 Codice di Procedura Penale (Italy); Art. 127 Codigo de Processo Penal (Portugal); Chapter 35 § 1 Rättegångsbalken (Sweden); Art. 741 Ley de Enjuiciamiento Criminal (Spain).

[62] See *Bundesgerichtshof* (Germany), reprinted in *Strafverteidiger* 409 (1991), requiring that in cases of identification based on a single witness, "the trial judge must comprehensively articulate the factors relied upon in support of the identification of the accused"; see *Nytt Judiriskt Arkiv* 725 (1980) , 446 (1992) and 176 (1996), where the Supreme Court of Sweden held that "all imprecision or inaccuracy in a witness' testimony must be addressed and analysed thoroughly by the fact finder"; see *R.* v *Harper*, [1982] 1 S.C.R. 2 (Canada) requiring appellate intervention where the reasons for judgement disclose "a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence"; see also discussion in *Kupreškić*, Appeals Judgement, para. 38

be part of the attack; it must be directed against any civilian population; it must be widespread or systematic and the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes;[63]

(b) It is not relevant that the other side also committed atrocities against the opponent's civilian population - such evidence may not be introduced unless it tends to disprove any of the allegations made in the indictment;[64]

(c) The expression "directed against" specifies that the civilian population is the primary object of the attack. Consideration may be given to means and method used to attack; status of victims, their number; discriminatory nature of the attack and nature of crimes;[65]

(d) The term "widespread" refers to the large-scale nature of the attack and the number of victims, while the phrase "systematic" refers to the "organised nature of the acts of violence and the improbability of their random occurrence."[66] The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials of authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a widespread or systematic attack;

(e) International tribunals have dispensed with the requirements of a policy or plan as a legal element, but such a requirement is retained under the Rome Statute.

276. Some clarification on the concept and use of command responsibility is also required by reference to established case law of international tribunals:

(a) The following three conditions must be met before a person can be held responsible for the criminal acts of another: a superior-subordinate relationship existed between the former and the latter; the superior knew or had reason to know that the crime was about to be committed or had been committed; and the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator;

(b) Control must be effective for there to be a relevant relationship of superior to subordinate. Control is established if the commander had the power or authority in either a de jure or a de facto form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed;

(c) "Having reason to know" requires a showing that a superior had some general information in his possession which would put him on notice of possible unlawful acts by his subordinates. For instance, past behaviour of subordinates or a history of abuses might suggest the need to inquire further;

(d) The evaluation of the action taken by superiors who have a legal duty to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators, must be done on a case-by-case basis. The superior is not obliged to perform the impossible; a

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63 *Kunarac* Appeals Judgement, para. 85

64 *Kupreskic* Trial Judgement, para. 88

65 *Kunarac* Appeals Judgement, para. 91.

66 *Tadic* Trial Judgement, para. 648.

superior should only be held responsible for failing to take such measures that are within his material possibility.[67]

277. The mode of liability of "planning" requires that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[68] In the case of aiding and abetting a crime, it must be shown that the act of assistance must have had a substantial effect on the commission of the crime by the principal offender.[69] Aiding and abetting could be established, for instance, through provision of weapons to be used by militias to commit crimes.

278. The Commission's principal observations on some of the trial judgements are highlighted below. These observations are made without prejudice to any ongoing appeals of the Ad Hoc Court cases.

(a) The *Silaen* judgement

279. Timbul Silaen was the police chief of East Timor in charge of security operations and was operational commander in the run-up to the referendum. He was charged with civilian command responsibility and alleged to be responsible for the acts of his subordinates in relation to five incidents.

280. The Panel of Judges considered the totality of the evidence and generally accepted the facts as established by both prosecution and defence witnesses discussed in the preceding section. Legal findings on the elements of crimes and legal requirements of modes of liability are also generally consistent with prevailing international jurisprudence, with the exception of the legal requirements of command responsibility under article 42 of Act 26/2000, the inaccuracies of which the Commission does not attribute to the Panel but to the drafters of the Act.

281. The Panel concluded that although Silaen was aware of the crimes committed during the incidents alleged, the involvement of the police, his only subordinate structure, in the commission of the crimes in question, was not proven. The Panel also considered the evidence of the Timorese witnesses who had alluded to the involvement of State forces, but concluded that it was insufficient to establish liability on the basis that the crimes were committed due to orders and systematic planning of the superiors of the perpetrators.

282. The Commission observes that although there was some documentary evidence such as the police operational plans Hanoen Lorosae I and II that were included in the BAP, the panel could not construe it to impute liability to the police in the evacuation of civilians as the indictment did not permit such interpretation. There was also no evidence, according to the panel, to show that Silaen ordered or was involved in the attacks. The panel also accepted that the situation in East Timor had deteriorated to the extent that at the material

[67] *Delalic* Trial Judgement, *Aleksovski* Trial Judgement, *Blaškic* Trial Judgement, *Kordic* Trial Judgement, *Kunarac* Trial Judgement, *Krstic* Trial Judgement, *Kvocka* Trial Judgement para. 314.

[68] See *Prosecutor* v. *Brđanin*, Case No IT-99-36-T (ICTY), Trial Judgement, 1 September 2004, para 268.

[69] *Ibid.,* para 271.

time, responsibility for security and order fell on the State and not only on Silaen. He was therefore acquitted of the charges.

283. The Commission finds that the panel's factual conclusions, based on the available evidence cited in the judgement, cannot be said to be erroneous or so unreasonable that no reasonable panel of judges could have arrived at the same conclusion. Based on the evidence presented at trial by the prosecution, the Commission cannot conclude that Silaen was wrongly acquitted by the Ad Hoc Court.

(b) The *Soares* judgement

284. The former Governor of East Timor, Abilio Soares was indicted on the basis of superior responsibility as a civilian leader responsible for the acts and omissions of his subordinates under article 42(2) of Act 26/2000 in relation to five major incidents. The subordinates were the Head of Liquisa Regency, Leoneto Martins, the Head of Covalima Regency, Drs. Herman Sedyono, and the Deputy Commander of Pro-Integration Forces, Eurico Gutteres (PPI). It was alleged that Soares knew or disregarded information that these subordinates were committing or had just committed crimes and did not take appropriate preventive or punitive measures.

285. The Commission has identified a number of legal errors in the judgement, some of which will be discussed. The Commission takes the view that some of them may be attributed to the limited scope of the indictment and the prosecution's failure to adduce sufficient evidence to substantiate all elements of the crimes charged.

286. To begin with, the indictment alleges that Soares knew about or deliberately ignored information that obviously showed that his subordinates *were committing or had just committed* serious human rights abuses in the form of murder and assault. The judgement fails to adequately address a crucial defence argument that there was no evidence that the killings and assault were committed by *these* subordinates.

287. The Panel examined at length the witnesses' evidence and convicted Soares despite the preponderance of evidence in support of the defence's case. Some of these witnesses were the very subordinates who were supposed to have committed the crimes, others were TNI or State officials. Most were called by the prosecution. In relation to the Suai incident, there were no victim-witness statements in the prosecution dossier and thus no victims were called to testify.

288. Instead, the evidence adduced for the panel's consideration was that UNAMET engaged in fraudulent conduct; that the Governor's office assisted the victims and refugees, prevented clashes and conducted investigations after each incident; that since UNAMET was in charge, the Governor was powerless; that the subordinates did not commit the crimes as alleged and that Soares was kept informed of violent incidents which he responded to by requesting more security for the areas affected. Soares also testified that the perpetrators responsible for the attack in Liquisa were arrested and that he had asked the TNI for additional security. The Panel also considered the evidence of one

victim-witness,[70] Barito, who was the only person to testify on the involvement of a TNI soldier in the Liquiça attack.

289. The Panel correctly established that as Governor, Soares controlled the *Bupatis* and was therefore a civilian superior of both Martin and Hedyono. However, the legal analysis for other elements of superior responsibility is deficient. The Commission concludes that the legal basis for the Soares conviction was incompatible with the theory of superior responsibility for these reasons:

(a) No evidence was adduced that the three subordinates concerned had perpetrated the crimes, neither was it alleged nor was it proven that Soares had effective control over the *perpetrators* (militias);

(b) The Panel held the accused responsible because he had allowed public facilities under his management to be used for a pro-integration rally[71] The Commission takes the view that this is more consistent with aiding and abetting, although the facts may not be sufficient to substantiate it;

(c) The panel held that the accused knew that members of Gutteres' militia groups were carrying firearms but did nothing because he had to remain neutral and left the rally to attend meeting without taking steps to disband it. This is more consistent with the theory of "omission", which requires a showing that the there is a failure to perform an act in violation of the accused's duty to perform such an act;[72]

(d) The panel's finding that there existed a superior-subordinate relationship between the accused and Gutteres is, in the Commission's opinion, legally flawed. The findings that Gutteres' PPI had received assistance directly from the accused as Governor and that "emotionally" there was a connection between the Governor and Gutteres, without more, are insufficient to establish superior-subordinate relationship. Unfortunately, Guterres was the only "subordinate" who was closely linked to the commission of crimes;

(e) Although the panel did a commendable job in listing all the evidence to show that the accused was aware of the commission of crimes and that he consciously disregarded the information, it was not relevant to establishing knowledge that his *subordinates* had committed crimes;

(f) Finally, it has not been established how and why the failure on the part of the *Bupatis* (to ensure that the security forces take firm action against the perpetrators) could be attributed to Soares.

290. Further, the finding that the accused should have taken measures to punish Dommiggus, the leader of the military wing of PPI, is also not convincing as there was little discussion as to why the accused should have surrendered Dommiggus to the authorities or the extent of the latter's culpability for the crimes committed by PPI.

291. In this judgement and in some others, there was little attempt to establish *in concreto* all the elements of crimes against humanity (the *mens rea* and *actus reus*)in relation to the

70 A total of two victim-witnesses were called by the prosecution.

71 Gutteres was convicted of instigating the participants at this rally to commit killings.

72 See *Blaskic* Appeals Judgement paras. 664-666.

perpetrators. Some of the judges erroneously attempted to prove these elements in relation to an *accused* that has been charged with command responsibility. Thus, in the *Soares* judgement, the panel incorrectly held that it was necessary to prove that Soares had knowledge of and sympathized with the policy to commit crimes. This is not a requirement under the theory of command responsibility, which proposes that a superior's liability rests on his/her failure to *prevent or punish.*

292. The Panel of Judges however, correctly defined the element of "plan" or "policy" and held that the facts demonstrated that the crimes were committed by the pro-integration group as part of a planned strategy to cause the pro-integrationists to win the referendum, at least at the level of the regional Government.

293. The Commission is also concerned by the panel's sparse reasoning to substantiate its decision to set aside the minimum sentence of imprisonment for 10 years prescribed by Act 26/2000 for each of the crimes charged in this case, and to substitute a term of imprisonment of three years. The Commission also finds that reference to the fact that the crimes were committed during a peak period of violence cannot properly be considered in mitigation of sentence according to international standards; indeed, it is during such periods of violence that the importance of superiors exercising proper control over their subordinates is particularly marked.

294. The Panel however, made a number of significant legal findings consistent with international practice and standards:

(a) That any fraud committed by UNAMET did not justify the ensuing commission of crimes or violence ;

(b) That relying on the jurisprudence of international tribunals and doctrinal sources, the principle of non-retroactivity does not apply to serious violations of human rights or humanitarian law ;[73]

(c) That the Ad Hoc Court is permitted to incorporate international jurisprudence, practices, principles and standards as it is dealing with crimes attracting universal jurisdiction.[74] Moreover, the rules of evidence and procedure applied by the international tribunals are those that are consistent with international standards;

(d) That credible consideration was given by the Panel to the standard of superior responsibility of civilian leaders in the applicable national legislation, drawing on relevant sources of international law, including the jurisprudence of the Nuremberg and Tokyo International Military Tribunals and the ad hoc international criminal tribunals, as well as doctrinal sources.

295. Soares was acquitted on appeal. The *Soares* judgement illustrates that crimes against humanity and legal theories such as superior responsibility are complex components of international criminal law requiring a sound knowledge of not only jurisprudence but also effective interpretation and application of the law to the facts. It may well be the case that

73 On 3 March 2005, the Constitutional Court's (MK) Panel of Judges rejected Soares' application for judicial review of the same issue.

74 Another relevant consideration would be the absence of relevant provisions in the domestic legislation.

the Panel was hampered by the limited scope of the indictment and the scarcity of the evidence, but it was also imperative that a conviction be founded on sufficient evidence.

(c) The *Damiri* judgement

296. In the *Damiri* case, the defendant was charged with murder and persecution on the basis of command responsibility. In deciding to convict him, the Ad Hoc Court considered all relevant evidence and provided a sufficiently reasoned opinion underlying their decision. The panel was also inclined to take judicial notice of facts established in previous cases and made reference, whenever necessary, to jurisprudence from other ad hoc international criminal tribunals to assist in its deliberations.

297. In their legal findings and deposition, the Panel of Judges accepted evidence from three Timorese victim-witnesses that soldiers and police had committed crimes together with the militias. The panel considered the statement of Bishop Belo, which was read out in court. In according weight to the statement, the Panel considered that Bishop Belo had provided eye-witness account of TNI involvement. In relation to all three witnesses, the Panel considered the totality of the witnesses' evidence and provided reasons for accepting or rejecting their evidence.

298. In assessing the reliability of witnesses, the Panel noted that out of the 30 witnesses presented in court, 12 were witnesses from the military community and observed that most of them were the former supervisors, colleagues or subordinates of the defendant. On this basis, the panel found that these witnesses were probably motivated to provide exculpatory evidence or – at least – to corroborate one another.

299. The panel carefully examined the facts and provided reasons for accepting some facts and rejecting others. The panel reasoned that it would be near impossible to prove the existence of a Government policy on 'ethnic cleansing', as Governments would never officially declare such policies. In establishing that there was a State policy to carry out an attack against the civilian population, the panel drew upon jurisprudence of ICTY and ICTR, and adopted the correct approach when it drew the necessary inferences of State policy from factors such as the involvement of top-level officials in the setting up of the plan of attack. The Panel held that the systematic nature and scale of the violence and the use of public and private resources used to implement the attack were indications of the existence of a State policy or plan.

300. The Panel concluded that the TNI in East Timor was the "prime element" in the "system of violence" due to the extent of its operational responsibilities and control in East Timor at the material time. It also rejected the special report of the team of army investigators who had investigated into the crimes in 1999 (and excluded the role of the TNI) because they had only interviewed four persons. The panel found that this report was unreliable, as it did not meet the requirements of a proper investigation, given that the incidents covered a vast area and affected a large number of victims; moreover, the interviews were not documented in official records. The panel found sufficient evidence to prove the involvement of the members of TNI and POLRI in the occurrence of riots or

clashes as charged by the Ad Hoc Public Prosecutor, and rejected the Ad Hoc Prosecutor's own submissions that there was no such involvement.

301. The panel's interpretation of the facts, in particular its willingness to find the existence of a State policy to attack the civilian population, is markedly distinct from the panel's approach in the *Tono Suratman* case.

(d) The *Kuswani, Salova and Martins* judgement (*Liquiça* case)

302. The *Damiri* case is contrasted with the case of *Kuswani, Salova and Martins,* who were, respectively, a local TNI commander, the head of police and a *Bupati* of Liquiça. In this case, the defendants were charged on the basis of command responsibility as military commanders or, in the alternative, as civilian superiors for crimes committed by the militia group BMP during an attack on the Liquiça church. Other modes of liability under Act 26/2000, such as attempting, plotting, assisting or committing were not charged, although the TNI was alleged to have participated in an attack on the Liquiça Church complex.

303. The judges in this case also pursued a more restrictive approach to the admissibility of evidence, declined to accord any weight to pre-trial statements of witnesses who were not available to testify in court, and refused to accept photocopies of documentary evidence. The judges were also careful to exclude the involvement of State actors outside the militia group BMP, although the panel did conclude, to satisfy the *chapeau* requirements of crimes against humanity, that the attack was an implementation of a sustained or systematic "policy". The judges rejected the evidence of victim-witnesses implicating the involvement of the State apparatus, and appeared to have accepted the defence's version of events, according to which the TNI was neither involved in the attacks nor facilitated the commission of crimes by the militias.

304. The Commission finds erroneous the apparent substitution of a material element of persecution – namely the severe deprivation of fundamental rights, contrary to international law – with a material element of the crime of torture under Indonesian law, namely "creating uncomfortable feelings, pain or harm or damage to health". As a result, the panel seemed to be assessing the culpability of the accused for a form of torture with discriminatory intent.

305. The Commission also finds the legal analysis of the panel at times convoluted and confusing. On the definition of the contextual element of "widespread attack", the panel referred to the impact of the attack "nationally and internationally", the "severe damage, material and immaterial loss" caused, the "horrible" character of the attack, leading to "feelings of insecurity" in the individual or society, and "involving many parties". The definition applied diverges somewhat from international standards, as defined in the jurisprudence of internationalized courts and tribunals, and the judgement in this case does not provide any substantiation for the definition adopted.

306. Regarding the definition of the "effective command and control" requirement of the modes of liability of command responsibility and superior responsibility, the Panel of Judges seemed to interpret "effective command and control" as "chain of command", and

thus required evidence of "a permanent regulation stating the official position of someone to someone else vertically, as a superior to an inferior or *vice versa*". The definition applied is inconsistent with international standards as defined in the jurisprudence of the international tribunals, according to which the test of effective control is not dependent upon chain of command, and can be satisfied through a material ability to prevent and punish the commission of offences. On the definition of a "military commander" relevant to the mode of liability of command responsibility, the panel adopted a particularly restrictive definition excluding, for example, police officers commanding armed police units, who may be considered as military commanders in certain cases. The judgement also provides limited consideration of the standard "effectively acting as a military commander" contained in Act 26/2000.

307. Applying its interpretation of command responsibility to the available facts, the panel examined whether the BMP was in the military chain of command or under the defendant's effective control. The panel concluded that TNI was not involved in the attack and that there was no superior-subordinate relationship between the leader of BMP and Kuswani.

308. All three defendants were acquitted, primarily as a consequence of the panel's unwillingness to adopt a less restrictive approach to admissibility of evidence and its interpretation of command responsibility.

(e) The *Tono Suratman* case

309. Brigadier-General Suratman was commander of the TNI forces in East Timor during the 1999 outbreak of violence. He was charged for crimes against humanity for failing to control troops under his command and to prevent TNI and police from participating in attacks in two separate incidents. It was alleged that he did not surrender the perpetrators to the appropriate authorities for investigation. He was acquitted of the charges.

310. It was the prosecution's case that Suratman knew or should have known that his troops committed or were committing crimes because first, he was informed by Kuswani about clashes between pro-independent and pro-integration groups and that based on that report, he had ordered negotiations to be conducted. In relation to the killings at Manuel Carrascalao's house, the prosecution alleged that Carrascalao had sought assistance from Suratman in relation to the pending attack on his home, but that Suratman told him that TNI was neutral and refused to provide him with firearms to protect the refugees seeking shelter at his home.

311. The Panel considered evidence from 26 witnesses, of whom 3 were victim-witnesses, 18 TNI, militias or government officials, and six were indictees. They essentially denied the involvement of TNI; testified that Suratman gave instructions to protect the refugees after the attacks; that TNI took preventive measures and assisted the victims and that the incidents were due to a dispute between the two groups. The panel also considered the evidence of Carrascalao and two witnesses who testified that the TNI had participated in the attack on Carrascalao's house. The statements of three other Timorese witnesses were read in court but not substantially discussed.

312. The panel's legal analysis of the elements of crimes against humanity was essentially correct and well researched. However, its application to the facts was less than comprehensible. The panel traced the contextual background of the events in 1999 and concluded that the offer of a referendum led to groups campaigning their causes through violence and terror and that the events in 1999 were caused by these political differences. The panel also characterized the post-referendum situation as an internal armed conflict between the pro-independent and pro-integration groups and concluded that the element of "widespread" or "systematic" attack had been satisfied. The Commission takes the view that it was essential that the panel find that the attack was carried by the pro-integrationists *against* the population. In establishing the contextual elements of crimes against humanity, the Commission does not see the relevance of finding that the other side was also carrying out an attack, unless such evidence was relevant to support a particular defence.

313. In relation to the policy aspect, the panel found that the violence was the result of the Government's "policy to offer the options", i.e. the referendum options of Timorese autonomy or independence from Indonesia. The panel's attempt to establish a link between the violence and a plan or policy is inconsistent with the definition of this contextual element of crime. Article 7, paragraph 2 (a) of the Rome Statute defines an "attack directed against any civilian population" as a "course of conduct" comprising multiple prohibited acts (such as murder, torture etc.) "pursuant to or in furtherance of a State or organizational policy *to commit such attack*" (emphasis added). The Elements of Crimes document specifies that:

> A *policy which has a civilian population as the object of the attack* would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

314. In contrast with the statutory legal position of the International Criminal Court, the prevailing jurisprudence of the Ad Hoc Tribunals holds that there is no requirement under customary international law of a "plan" or "policy" to support either the attack as a whole or the specific acts of the accused.[75] Early jurisprudence of ICTY and ICTR had interpreted the "systematic" contextual element of crime as requiring a plan or policy to commit the acts in question.[76]

315. However, the panel in the *Suratman* case did not follow any variation of such reasoning, and instead appears to have required that a crime against humanity take place in furtherance of *any* State policy, rather than a policy to commit an attack directed against a civilian population. The Commission's review of several trial judgements does not disclose direct evidence of such a plan or policy on the part of any State, but it would appear that different panels were willing to draw the necessary inferences, depending on the adequacy of evidence presented by the prosecution.

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[75] *Kunarać* Appeals Judgement, para. 98. This position has since been followed by the ICTY and ICTR: see e.g. *Tuta* and *Štela* Trial Judgement, para. 234 and *Semanza* Trial Judgement, para. 329.

[76] See for example *Tadić* Trial Judgement, paras. 653-655; *Kayishema* Trial Judgement, para. 124.

316. The *Suratman* panel also misconceived the contextual "knowledge" requirement for crimes against humanity. It concluded that Suratman had the requisite knowledge because his subordinates had provided him reports on the violence. This confuses the knowledge requirement of a superior with that of the perpetrator. It is not required that the superior be aware of every single element of the crime in question. Showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, would be sufficient to prove that he "had reason to know".[77] The reports were more relevant to establish that Suratman was placed on notice that crimes might have been committed by his subordinates, if that was indeed the case.

317. The panel's discussion of superior responsibility is also accurate, relying on the jurisprudence of the international military tribunals established after World War Two and ad hoc international criminal tribunals.

318. The issue at the heart of the case was whether troops under Suratman's command and control were involved in the attacks. In its assessment of the evidence, the panel relied substantively on evidence which favoured Suratman, such as Wiranto's, Gutteres' and other TNI witnesses' testimonies that the military was only initiated days after the referendum and that prior to that, security was the responsibility of the police force. The panel concluded that the attack on Pastor dos Santos was due to his refusal to surrender the leader of the pro-independent group and that there was insufficient evidence that TNI was involved in the attack. It held that TNI assisted the refugees and it helped to separate the two groups. Not surprisingly, the panel concluded that the testimonies of more than 20 other witnesses negated the two victims' evidence.

319. There was also very little analysis of the rally leading to the attack on Carrascalao's house. The panel concluded that the attack occurred spontaneously, as Guterres' cohorts attempted to assist an injured woman outside the house. Gutteres' role was not discussed and the interpretation of the facts is incongruous with the extent of Guterres' participation in the crimes, as discussed below. The panel also inconsistently characterized the violence as "spontaneous clashes" while attempting at the same time to establish a widespread and systematic attack pursuant to a State policy.

320. The case of Tono Suratman was considerably weakened due to the selection of witnesses. The panel also did not examine possible motivations of TNI associated witnesses and other indictees who testified, appearing to accept their evidence since they corroborated each other.

(f) The *Gutteres* judgement

321. In the *Guterres* judgement, the panel engaged in substantive and comprehensive discussion of the law, facts and evidence in support of its findings. The Commission finds that the judgement offers a reasoned opinion documenting all evidence considered and substantiating the legal and factual basis for the conviction. The judges in the *Gutteres* case were also more actively engaged in the judicial process, ordering the prosecution to

[77] *Delalic* Appeals Judgement, para 238 ; *Krnojelac* Appeals Chamber, para 155.

produce Timorese victims as witnesses and, when the prosecution was not able to secure their attendance, permitted their statements to be read in court, which was accorded the weight of testimony given under oath pursuant to article 162 of the Code of Criminal Procedure.

322. The panel listed and analysed the documentary evidence presented by the prosecution and made a series of substantiated factual findings in support of its conclusions that the defendant was actively inciting individuals at pro-integrationists rallies to “exterminate” and “kill” the pro-independence supporters. The judges also found there was a close link between the defendant and the POLRI and TNI because the security forces had often asked the defendant for information and for help to settle conflicts and disputes. In relation to acts of extermination and the scorched earth campaign that followed the announcement of the result of the popular consultation, the panel found that the police and the TNI were also involved in acts of destruction and extermination.

323. The panel also analysed the relevant provisions of the Code of Criminal Procedure, enumerating the factors underpinning the reliability of a witness statement and provided detailed reasoning as to why some witnesses’ evidence were accepted as true and accurate.

324. The judges accepted witnesses’ evidence that the crimes charged were committed by militias under the command and control of the defendant; that there was corroborated evidence that the defendant’s incitement invoked a violent response from the participants in a rally; and that he had knowledge of the consequences of his acts. The judges concluded from the totality of the evidence that the defendant did not try to prevent or had failed to prevent the crimes committed by his subordinates and his trainees after the rally.

325. The judges also embarked on a substantially accurate legal analysis of the legal elements of crimes against humanity and legal requirements of command responsibility, citing jurisprudence from ICTY and ICTR, World War Two war crimes cases and the legal framework of the International Criminal Court to find that civilian leaders holding de facto positions of authority can be found liable under the theory of command responsibility. The panel analysed the relevant organizational structure of militia groups to find that the defendant possessed de facto and de jure authority within and beyond his power structure.

326. The judges were also willing to find that the crimes charged were committed as part of a widespread and systematic attack, although they did not substantiate the nature of the attack (erroneously holding that the “clash” could be considered as part of an attack aimed “towards” civilians). However, other contextual elements of crimes against humanity were generally adequately proven and substantiated. The judges also rejected defence arguments as to the form of the indictment, concluding that typographical errors in the indictment did not prejudice the defendant in the preparation of his defence, consistent with established jurisprudence of the ad hoc international criminal tribunals.

(g) The *Soedjarwo* judgement

327. Lt. Col. Soedjarwo was the TNI Commander (Dandim) in Dili and he was charged for attacks on the Dili diocese and Bishop Belo’s residence based on his failure to prevent

the attacks and to control his troops. He was convicted and sentenced to five years' imprisonment.

328. In Soedjarwo's case, the prosecution called 15 witnesses, of which 14 were members of the TNI, Government officials or militia members. The prosecution was unable, under the circumstances, to adduce evidence that the TNI or other State security forces were involved in the commission of the crimes. The pre-trials statements of six witnesses were read in court as they were not available to testify.

329. The Panel found that the defendant, as District Military Commander in Dili, had the requisite authority and jurisdiction to make him responsible for the acts of subordinates under his direct command or control; and that the defendant had the obligation to lead, control, and monitor his personnel.

330. The judgement is commendable in its legal analysis of contextual elements, such as the widespread and systematic attack against civilian population relying on the jurisprudence from ad hoc international criminal tribunals and doctrinal sources. The judgement is also substantially accurate in its legal analysis of command responsibility, drawing upon established jurisprudence. However, some aspects of command responsibility find no support in established jurisprudence. The panel found that "the people who were committing or just committed a gross violation against human rights," are not restricted to those who have committed crimes but also those who did not take necessary action to prevent a gross violation of human rights, implying that the defendant can be held liable for the omission of his subordinates.

331. Thus, in relation to the attack on Bishop Belo's house, the judges carefully sifted through the available facts to conclude that the defendant, as District Military Commander, was responsible for security and order in Dili and should not have agreed to withdraw TNI troops from the protection of Bishop Belo's residence without considering the worsening condition and volatile atmosphere in Dili at that time. The panel found that he was expected to take the most effective action in the circumstances. The judges convicted Soedjarwo not because he failed to *control* the perpetrators, but because he failed to anticipate the attack. The Commission takes the view that this may not be an accurate application of the law on command responsibility.

332. The panel essentially rejected the prosecution's theory as set out in the indictment, as there was little evidence of TNI participation. The panel made no findings that the TNI were in complicity with the perpetrators in orchestrating or assisting in the attacks. Although the Commission cannot agree with the doubtful reasoning which led to the rejection of the victim witnesses' statements documenting active TNI involvement, it cannot be concluded that these findings were unreasonable in light of the overwhelming evidence adduced by the prosecution, which cast doubts on its own case. Unlike the panel in the Damiri case, this panel did not find it necessary to examine whether TNI affiliated witnesses were motivated to deny State involvement.

F. Conclusion

333. Six out of the 18 defendants tried by the Ad Hoc Court were found guilty of crimes against humanity. All but Eurico Gutterres were sentenced to terms of imprisonment below the statutory minimum term. The Supreme Court has upheld the acquittals of most of the defendants; one accused remains convicted and free pending the resolution of his appeal. The verdicts and results do not reflect a pattern of trials reaching pre-ordained outcomes, but the atmosphere and context of the entire proceedings are indicative of lack of political will in Indonesia to seriously and credibly prosecute the defendants.

334. One of the judges who has served on the bench of the Ad Hoc Court complained that Kopassus soldiers were permitted to attend the hearings in large numbers, some of them armed. The judge in question noted that when he was about to deliver the verdict, Kopassus soldiers would shout words of warning and intimidation. The judge was concerned that the organization of the courtroom and applicable domestic legislation did little to ensure the security of the judges. He expressed little faith in the ability of the Ad Hoc Court to render decisions that would ensure the confidence of the public or the international community in the Indonesian judicial system. Another ad hoc judge was of the view that the work of the Ad Hoc Court has not made any significant contribution to strengthening the rule of law in Indonesia, to the restoration of peaceful and normal relations between the two peoples except possibly, at the “governmental level”, and that it is incapable of dealing with complex human rights cases involving the “big fish.”

335. As discussed above, the Commission has concluded that the Ad Hoc Prosecutors leading these trials were neither adequately prepared nor knowledgeable enough to prosecute complex crimes against humanity cases. The Commission does not have sufficient evidence to address the motivations of the Prosecutors of the Attorney-General’s Office, but is compelled to conclude that the Indonesia ad hoc judicial process for East Timor has failed largely due to the incapacity of the prosecution to seriously and adequately prove its case against the defendants. This failure, viewed in conjunction with the lack of political will, plays a significant role in the Commission’s final recommendations.

336. The Commission concludes that diverging approaches and judicial technique of the panels in relation to selection of and reliance on evidence, willingness to apply international standards, practice and jurisprudence to supplement and clarify national laws, and proficiency in analytical evaluation of facts and law contributed to the different and inconsistent verdicts and decisions of the Ad Hoc panels. In some cases, the judges were unduly restricted by the pleadings in the indictment and in particular, the lack of judicial mobility to apply appropriate modes of liability to convict the accused has also led to erroneous conclusions and verdicts.

337. The more complex issues that should have been raised and/or discussed such as the historical and contextual background of events in 1999, the involvement of State policy or actors, the military and civilian structures of power and the birth and role of the militias

were issues requiring expert assessment and opinion and extensive analysis of all relevant evidence. Such analysis was absent in most of the judgements.

338. The Commission finds that those panels that were inclined to convict the accused have rendered judgements that are considerably more reasoned and jurisprudentially articulate. Other judgements are rudimentary in legal analysis and in their rejection of the prosecution case. The consequences of the differing and inconsistent verdicts and factual conclusions are, however, far-reaching and damaging to the central objectives of the judicial process before the Ad Hoc Court, which were to establish an accurate historical record of the events in 1999, to hold those most responsible accountable for their crimes, and to strengthen the rule of law in Indonesia.

339. The Commission has serious doubts that any of these objectives have been achieved. This failure is relevant to the Commission's final recommendations to the Secretary-General.

IV. The Commission of Truth and Friendship

A. Mandate

329. On 14 December 2004, the Governments of Indonesia and Timor-Leste concluded a bilateral agreement on the establishment of a Commission of Truth and Friendship (CTF). The two Governments have recently promulgated the terms of reference of the Commission, explaining that its purpose is to "… seek truth and promote friendship as a new and unique approach rather than the prosecutorial process." The Commission will comprise five Commissioners from each country, to be appointed by joint declaration by the Presidents of Indonesia and Timor-Leste.

330. The Commission of Experts is mandated to consider ways in which "…its analysis could be of assistance…" to the Commission of Truth and Friendship, and make recommendations to the Secretary-General in this regard. The Governments of Timor-Leste and Indonesia have also requested that the Commission provide advice and guidance to assist the work of the Commission of Truth and Friendship.

331. The Commission has carefully examined the terms of reference of the Commission of Truth and Friendship in the context of its review, including its consideration of the existing legislative framework of Timor-Leste and Indonesia. The Commission will highlight several areas of the terms of reference that could be reconsidered or improved.

332. The Commission must reiterate that the judicial processes and recommendations considered elsewhere in the present report are distinct from the Commission of Truth and Friendship, which is essentially a bilateral agreement between the two Governments concerned.

B. Analysis of the Commission of Truth and Friendship Terms of Reference

1. Absence of distinction between categories of perpetrators

333. The terms of reference do not distinguish between categories of alleged perpetrators or deponents who may appear before the Commission of Truth and Friendship (CTF). In particular, those who "bear the greatest responsibility" for serious human rights violations are not distinguished from (a) alleged low-level offenders implicated in serious human rights violations; or (b) alleged perpetrators of less serious violations. This is in marked contrast with the mandate of the Commission on Reception, Truth and Reconciliation (CAVR) in Timor-Leste.

334. The Commission is concerned that the terms of reference of the CTF may extend its mandate to include individuals who bear the greatest responsibility for the commission of serious crimes in East Timor in 1999 and who should, in accordance with international standards, face justice before a court of law.

2. Absence of specific mechanisms to address serious human rights violations per se

335. The CTF is mandated to examine and establish the truth concerning "reported human rights violations" in the period "leading up to and immediately following the popular consultation in Timor-Leste in August 1999". This mandate appears to include violations at all levels of gravity. The Commission is concerned that the terms of reference do not explicitly provide for specific mechanisms to address *serious* human rights violations or allegations of *serious crimes* outside the CTF process.

336. This approach is distinct from the mandate of the Commission on Reception, Truth and Reconciliation in Timor-Leste, which requires that it refer evidence of serious crimes to the SCU for a decision on prosecution.

3. Power to recommend amnesty for serious crimes

337. The CTF is granted the power to recommend amnesty for serious violations of human rights. However, given the constitutional framework of Timor-Leste, which provides for the prosecution of serious crimes before the Special Panels or an international court (if established), and gives binding effect to customary international law in the national legal system, the two Governments may wish to consider whether it is tenable to empower a bilateral body to grant amnesty for serious violations of human rights amounting to international crimes.

338. Referring to relevant international standards crystallized over time, the *reconciliation practice* of the CTF should bar access to amnesty procedures for cases of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto, and other violations of international humanitarian law and international human rights that are crimes under international law, and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution and slavery.[78]

339. The two Governments may wish to consider whether in other cases of serious violations of human rights, a recommendation to grant amnesty could be premised on certain conditions additional to truth-telling, such as suitable reparations to victims,[79] full cooperation with the ongoing judicial processes, or conditions derived from the practice of the CAVR, such as orders for community service, public apology or other acts of contrition.

340. In this regard, the Commission observes that the power to recommend amnesty is presented in the CTF terms of reference as only one of a series of possible measures with the stated aim of healing the wounds of the past, rehabilitating and restoring human dignity.

[78] See the Set of Principles to Combat Impunity. (E/CN.4/2005/102/Add.1, Principle 24). See also *Prosecutor* v. *Furundzija*, (ICTY), Trial Chamber Judgment, 10 December 1998, para. 155; Special Court for Sierra Leone, *Prosecutor* v. *Kallon*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004. See also the Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).

[79] In particular, although Act No 26/2000 provides that all victims "shall receive compensation, restitution and rehabilitation" (art. 35), a NGO report dated September 2003 observed that no such applications had been presented in cases heard by the Ad Hoc Court in Jakarta.

341. The two Governments are invited to reconsider structuring the exercise of discretion to recommend amnesty in light of applicable international standards, including potential bars or pre-requisites to recommending amnesty, and factors to consider in exercising this discretion.

4. Apparent exclusion of further justice or accountability mechanisms

342. The objective of the CTF is to bring "definitive closure" and establish the "conclusive truth", to the apparent exclusion of further justice processes. Paragraph 10 of the terms of reference suggests a preference for truth-seeking and the promotion of friendship through the CTF rather than through the judicial process. This is somewhat inconsistent with the declaration in paragraph 8(a) of the terms of reference that the judicial process before the Ad Hoc Court has not been completed. Clarification is required as to the precise extent to which serious human rights violations will be resolved through the CTF to the exclusion of existing or future criminal justice processes. The two Governments may wish to reassess the exclusion of further justice processes in the terms of reference.

343. In this regard, it is noteworthy that the CTF is directed to work under the principles contained in the relevant national legislation on reconciliation. The applicable Timorese legislation establishing the CAVR clearly implements international standards by barring access not only to blanket amnesty, but to all forms of community reconciliation processes for those implicated in all *serious crimes* – defined as genocide, crimes against humanity, war crimes, murder, sexual assault and torture – and maintains the prosecution of such cases under the exclusive jurisdiction of the General Prosecutor.

344. Indonesia's legislation on human rights courts addresses the relationship between such courts and reconciliation processes, and provides that cases of gross violations of human rights (limited to genocide and crimes against humanity) cannot be addressed simultaneously through reconciliation processes and *vice versa*. Indonesia's legislation on substantive human rights standards, Act 39/1999, further provides, in article 17, that "Everyone, without discrimination, has the right to justice by submitting applications, grievances and charges, of a criminal civil and administrative nature and to a hearing by an independent and impartial tribunal…" Act 26/2000 also mentions a Truth and Reconciliation Commission as referred to in the decree of the People's Legislative Assembly No. V/MPR/2000 concerning of Consolidation of National Unity and Integrity. This Truth and Reconciliation Commission will be established under an act as an *extrajudicial* agency charged with establishing the truth by discussing past misuse of authority and violations of human rights, in accordance with prevailing law and legislation, and with undertaking reconciliation in the common interest of the nation.

345. Thus, despite notable differences in the legal framework, the Commission observes that applicable national legislation in both Indonesia and Timor-Leste recognize the central importance of prosecuting serious violations of human rights through the courts.

5. Treatment of confidential material and witnesses

346. The CTF is entitled to review, inter alia, existing SCU indictments in order to establish "the truth concerning reported human rights violations including patterns of behaviour". Such findings

may compromise future adjudication of cases of serious human rights violations. The two Governments may wish to consider how the CTF could implement provisions protecting the confidentiality and integrity of information and the security, physical and psychological well-being and privacy of victims and witnesses who may appear before the CTF, so as to fully respect the rights of victims and witnesses and not to compromise investigations and prosecutions of serious crimes. In particular, the Commission takes the view that an agreement must be reached regulating information sharing and use of information obtained from the Special Panels, SCU the Ad Hoc Court and CAVR.[80]

6. Independence of the CTF

347. The Commission notes that the Foreign Ministers of Indonesia and Timor-Leste have been appointed to act in an "advisory" role to the CTF, although the Commissioners are mandated to work independently. In the interests of transparency, the two Governments may wish to clarify in detail their respective roles in this process.

7. Governmental support not necessarily indicative of public support

348. The Commission of Truth and Friendship has received the sanction of the Governments of Indonesia and Timor-Leste, and has been praised at the sixty-first session of the Commission on Human Rights by the Foreign Ministers of both States. However, the Commission of Experts has ascertained that the Government's firm support for the Commission of Truth and Friendship does not necessarily reflect broad public support in Timor-Leste, according to oral and written statements provided to the Commission by civil society, including international justice NGOs, victims' groups and civil and religious leaders in Timor-Leste, as well as other sources.

349. A member of an Indonesian-based NGO has commented that "There are no problems at all between Indonesians and East Timorese, so a reconciliation between peoples of the two countries is not needed. The problem of human rights violations in East Timor does not lie in people-to-people relations, but lies instead with the TNI and its militias as the alleged perpetrators of the violence against the East Timorese."[81]

350. All of the victims and victims' families with whom the Commission met have pointed out that they are dissatisfied that perpetrators of serious violations of human rights in 1999 are still at large in Indonesia and have not been brought to trial in a court of law.

351. The Commission notes that the Commission of Truth and Friendship was established through diplomatic channels without the consultation and moral authority of the people of Timor-Leste. The Commission is advised that the terms of reference were not rigorously debated by the Parliament of Timor-Leste prior to their approval by the two Governments, although the Commission has been informed that apparently most Timorese parliamentarians support the CTF. The Commission has

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[80] In this regard, the Commission observes that the terms of reference of the CTF do not *specifically* provide for access to the records of the SCU, but the Commission has interpreted the terms of reference to include such access

[81] "New international initiative needed to create justice for East Timor", The Jakarta Post, 19 May 2005, by Agung Yudhawiranata (international relations researcher at ELSAM).

been advised that the Terms of Reference of the Commission of Truth and Friendship have been viewed as a bilateral agreement and will not be ratified by the Indonesian parliament.

8. Reparations

352. The Commission envisages a role for the Commission of Truth and Friendship in ensuring that the right of victims to reparation is implemented through measures of compensation, rehabilitation, satisfaction and guarantees of non-repetition, as appropriate, but is concerned that its terms of reference do not establish a framework for the implementation of this right that satisfies international standards. The Commission recommends that both Governments consider the question of reparations, particularly collective compensation, as one of the implementation measures available to the Commissioners of the CTF.

9. International support for the Commission of Truth and Friendship

353. The Governments of Indonesia and Timor-Leste must realise that the United Nations do not condone amnesties regarding war crimes, crimes against humanity and genocide.

354. Any possible involvement of the United Nations in the work of the CTF must be premised on an understanding of the extent of the CTF's mandate. For instance, the Commission notes that during the trials before the Ad Hoc Court, allegations of fraudulent conduct were made by indictees and witnesses against UNAMET. This issue was discussed at length during some of the trial proceedings. The Commission is conc erned that the terms of reference of the CTF do not preclude a further "revisiting" of the role of UNAMET on the basis of access to materials, including witness statements, from the Ad Hoc Court.

355. As discussed above, the Commission has grave reservations regarding certain areas of the terms of reference. Under the circumstances, the Commission cannot advise that the international community provide financial and/or advisory support unless the two Governments reconsider the terms of reference, and the Secretary-General is satisfied that the CTF conform to international standards, in particular to principles 6 to 18 of the updated Set of Principles to Combat Impunity relevant to truth commissions.

V. Findings

356. On the basis of the above analysis, the Commission summarizes its findings as follows.

A. The serious crimes process (Timor-Leste)

357. The Commission finds that the serious crimes process in Timor-Leste – including investigations, indictments, prosecutions, defence and judicial proceedings – is generally satisfactory and accords with international standards.

358. The Commission finds that the serious crimes process has been able to achieve some measure of justice for the victims and their families and has contributed to community reconciliation. It has achieved accountability for some of the atrocities committed in 1999, and has contributed to strengthening the rule of law in Timor-Leste, for example, through constructive interaction between international and domestic prosecutors, judges and lawyers, investigators, and training of domestic law enforcement and judicial officers.

359. However, the Commission finds that the serious crimes process has not achieved accountability of those who bear the *greatest responsibility* for serious violations of human rights in East Timor in 1999.

360. The Commission finds that the inability of the serious crimes process to bring most alleged perpetrators to trial is due to a lack of an extradition agreement between Indonesia and Timor-Leste or any other form of effective mutual legal assistance framework for the arrest and transfer of indictees at large.

361. SCU did not implement a clear prosecution strategy or focus at the outset of its operations, and has faced a stringent lack of resources in its work. The Commission finds a pressing need for properly resourced investigations to continue in Timor-Leste, and for evidence to be preserved.

362. The Commission finds that the Special Panels have experienced a critical lack of capacity, inadequate administrative support and infrastructure and organizational planning during the first two and a half years of their operations. There is a need for additional resources to be allocated in areas such as security and legal research, to enable the administrative staff and judges to function more effectively and efficiently.

363. The Commission finds that the Office of the General Prosecutor of Timor-Leste does not, at present, function independently from the Government of Timor-Leste and appears to be subject to undue political pressure and influence.

364. The Commission finds an absence of political will and Government support in Timor-Leste for the continuation of the serious crimes process, which seriously impedes the process of bringing to justice those responsible for crimes against humanity in East Timor in 1999 through the available judicial mechanisms in Timor-Leste.

365. The Commission finds that the domestic investigative and prosecution authorities of Timor-Leste are unlikely to have the capacity to undertake the investigation and prosecution of serious crimes in accordance with international standards if the SCU is withdrawn from Timor-Leste.

366. The Commission finds that the Special Panels do not, as yet, have the institutional capacity to hear and adjudicate serious crimes cases without an international component.

367. The Commission finds that that there is an absence of competent Timorese defence counsel with experience in the conduct of serious crimes cases.

B. The Ad Hoc Human Rights Court for Timor-Leste (Indonesia)

368. The Commission finds that the KPP HAM report provides an authentic account of the human rights violations in East Timor and a credible template for further investigations in areas where there has been a lack of cooperation or access to information. The Commission finds that the inquiry procedures of KPP HAM conformed to international standards relating to pro justitia inquiries.

369. The Commission finds laudable and progressive recent legal reforms to ensure independence of the judiciary and achieving respect for human rights in the Republic of Indonesia.

370. However, the Commission finds that the judicial process before the Ad Hoc Court was seriously flawed and inadequate. In particular, the scale and widespread occurrence of violence and the systematicity of the attacks against the civilian population of East Timor were not thoroughly addressed, as the temporal mandate of the Ad Hoc Court was unduly restrictive. The trial proceedings before the Ad Hoc Court did not give due consideration to the relationship between the Government of Indonesia and paramilitary and civilian militias, and the full culpability of those involved in the perpetration of the crimes. Furthermore, the trial proceedings did not adequately consider or refer to the organizational structure, chain of command and control, and plan and policy of the armed forces involved in the events of 1999.

371. The Commission finds that prosecutions before the Ad Hoc Court were manifestly deficient. There was little commitment to an effective prosecution process, which was marred by numerous lacunae in the conduct of investigations, protection of witnesses and victims, presentation of relevant evidence, lack of professionalism and ethics and rigorous pursuit of truth and accountability of those responsible.

372. The Commission finds that there was inadequate infrastructure and logistical arrangements in place to ensure non-disclosure of the identity of victim or witness and to prevent intimidation of witnesses and judges.

373. The Commission finds that the Panels of judges of the Ad Hoc Court applied divergent approaches and judicial techniques in their analysis and reliance upon evidence. Their willingness or otherwise to apply international human rights standards, practice and jurisprudence to supplement

and clarify national laws, and their proficiency in analytical evaluation of facts and law have contributed to the inconsistent factual findings and verdicts of the Ad Hoc Court.

374. The Commission finds that the inconsistent verdicts and factual findings of the Ad Hoc Court have undermined the central objectives of this judicial process, namely to establish an accurate historical record of the events in 1999, to hold those most responsible and accountable for their crimes, and to strengthen the rule of law in Indonesia.

375. The Commission finds that the judicial process before the Ad Hoc Court was manifestly inadequate with respect to investigations, prosecution and trials, and has failed to deliver justice. The atmosphere and context of the entire court proceedings were indicative of the lack of political will in Indonesia to seriously and credibly prosecute the defendants.

C. Commission of Truth and Friendship

376. The Commission finds that there are certain provisions in the terms of reference of the Commission of Truth and Friendship which contradict international standards of denial of impunity for crimes against humanity, which require clarification, re-assessment and revision. However, the spirit of reconciliation in the other provisions of the terms of reference, including the possibility of providing reparation for harm caused, offer appropriate avenues for rebuilding the relationship between Indonesia and Timor-Leste.

VI. Justice for Timor-Leste

377. Before the Commission examines all the available options and sets out it recommendations, it is pertinent to make a few observations on the prevailing views of the people of Timor-Leste, the Governments, the United Nations and the international community interested in the judicial processes of Indonesia and Timor-Leste.

378. The Government of Timor-Leste views the Commission of Truth and Friendship as a mechanism to establish truth. It believes that if Indonesia acknowledges the truth, this process may itself bring a sense of resolution as Indonesia confronts its past. The Government of Timor-Leste is convinced that the Commission of Truth and Friendship is the only way forward as it places great significance on its relationship with Indonesia. It believes in restorative justice and is confident that the Timorese people are forgiving. President Gusmão has stressed that the main objective of the Commission of Truth and Friendship is to ascertain the truth and establish institutional responsibility. The Government of Timor-Leste is now unequivocal that it will not endorse any United Nations initiative that will require the political and logistical support of the Government.

379. The Commission takes the view that a truth-seeking commission could assist in completing the work of the serious crimes process in Timor-Leste by collecting and preserving information and evidence that could be utilized in future prosecutions. A truth-seeking mechanism may not, however, achieve justice in the sense understood by civil society and victims groups, or the justice that the Security Council hopes to achieve in Timor-Leste, as expressed in its resolution 1264 (1999).

380. The Commission takes the view that any credible reconciliation or truth-seeking process, if established in Timor-Leste or Indonesia after CAVR concludes its mandate would have to be designed and implemented in parallel with, or explicitly complementary to any justice initiative the Security Council decides to adopt.

381. In many discussions with victims' groups and NGOs, the Commission has heard consistent calls for those individuals responsible for serious human rights violations in 1999 to be brought before a credible justice process. The Commission was advised that in a recent opinion poll, 52 per cent of the population responded that justice must be sought even if it slows down reconciliation with Indonesia, while 39 per cent favoured reconciliation even if that meant significantly reducing efforts to seek justice.[82]

382. The victims addressing the Commission firmly viewed monetary compensation as less significant than witnessing a credible justice process in a court of law. Victims groups have also expressed full support for the continuation of the work of the serious crimes processes in Timor-Leste, but have raised concerns that only Timorese offenders have been tried and sentenced and that those who bear the greatest responsibility are still at large. It is their desire to see that these individuals are investigated, prosecuted and punished by a credible judicial mechanism.

383. The Commission had the opportunity to meet with the head of the Catholic Church in Timor-Leste, the Bishop of Dili, to discuss relevant matters pertaining to the events in 1999. The Bishop

[82] National Public Opinion Poll, Executive Summary, 2004, conducted by the International Republican Institute.

was forthright in his views about the events of 1999 and stated in no uncertain terms that a justice mechanism should be adopted to bring those responsible to justice and to compensate the victims. The religious leaders in Timor-Leste have expressed hope that the voice of the Timorese people, who have suffered a situation of impunity, would be heard. They will continue to insist on the moral and legal accountability of all individuals who have committed human rights violation and crimes against humanity in East Timor from 1975 to 1999. They have emphasized that the Commission of Truth and Friendship should not be treated as a substitute for criminal justice and that there will be no progress in the implementation of the rule of law and democracy in Timor-Leste if impunity prevails. The Bishop has provided us with a statement, reproduced in annex B.

384. In its most recent resolution 1599 (2005) of 28 April 2005, the Security Council "reaffirms the need for credible accountability for the serious human rights violations committed in east Timor in 1999" and "looks forward to the Commission's upcoming report exploring possible ways to address this issue."

385. In conclusion, the Commission recalls resolution 2005/81, adopted by the Commission on Human Rights at its sixty-first session, which was chaired by Indonesia. In this resolution, the Commission urged Member States:

> "To provide the victims of violations of human rights and international humanitarian law that constitute crimes with a fair, equitable, independent and impartial judicial process through which these violations can be investigated and made public in accordance with international standards of justice, fairness and due process of law."

386. Despite the progressive reforms the Republic of Indonesia has adopted, the Commission cannot overlook the large-scale violations of human rights alleged to have been committed by the Indonesian armed forces. These gross violations of human rights cannot be allowed to go unpunished.

387. The Commission has given due consideration to the many competing interests, demands, and views on justice for the Timor-Leste people. The Commission is however, primarily guided by fundamental aspects of its mandate which is to determine whether full accountability has been achieved and to recommend future actions as may be required to ensure accountability and promote reconciliation in Timor-Leste.

VII. Available justice mechanisms and initiatives

A. Introduction

388. The Commission will now turn to examine all available justice mechanisms to address the twin issues of impunity and accountability. The Commission is guided by the Secretary-General's requirement, as set out in its terms of reference, that the Commission consider and recommend "legally sound and practically feasible measures and/or mechanisms so that those responsible are held accountable, justice is secured for the victims and the people of Timor-Leste and reconciliation is promoted."

389. It must be emphasized that the exercise of national criminal jurisdiction over the most serious crimes of concern to the international community as a whole is an expression of the *primary responsibility* of States to ensure that those responsible for such crimes do not go unpunished.

B. Options relevant to the Ad Hoc Court (Indonesia)

1. Reform of the judicial process

390. The Ad Hoc Court is central to the protection and promotion of human rights and freedoms in Indonesia and ensuring that the victims of the 1999 crimes obtain effective remedies and protection. Although the Commission has been advised of significant legal and judicial reforms to ensure independence of the judiciary, it is essential that Indonesia addresses the serious shortcomings, obstacles and failures inherent in its judicial system and undertakes credible reforms of its justice process.

391. The Commission has given due consideration to the question of whether Indonesia should undertake significant reforms of its judicial system in accordance with international standards, and has made specific recommendations relevant to the Ad Hoc Court.

2. Re-trial of adjudicated cases

392. The Commission will now examine the possibility of the re-adjudication of the trials completed in Jakarta.

393. The Commission notes that a number of indictees in the indictment of *Wiranto et al.* by the SCU in Timor-Leste – namely Abilio Soares, Adam Damiri, Tono Suratman, Noer Muis and Yayat Sudrajat – have all been prosecuted and have either been convicted or acquitted by the Ad Hoc Court in Indonesia. Those who were convicted at trial have been acquitted on appeal. During our mission in Dili, the SCU has expressed its intention to pursue the *Wiranto et al.* indictment against the same individuals, regardless of the outcome of the Indonesian trials.

394. In light of the seriously flawed judicial process at the Ad Hoc Court in Jakarta, the Commission faces the question of whether there is a legal basis upon which to pursue a re-trial of these individuals, either in Timor-Leste or in Indonesia or elsewhere.

395. The Constitution of Indonesia enshrines the principle *ne bis in idem*; under Indonesian law, the only exception to this principle would be the discovery of additional evidence not available at trial. It is arguable, however, that other exceptions to the *ne bis in idem* principle are recognized in international law as well as domestic law if it can be demonstrated that the trial was seriously flawed.

396. If Indonesia is to re-try the individuals named above, the Commission takes the view that the Special Panels in Timor-Leste are not barred from trying the same individuals under the present indictment of the SCU, as elaborated below.

397. In relation to Timor-Leste, section 11 of UNTAET Regulation No 2000/15 provides for a re-trial in situations where proceedings in the other court satisfy the criteria laid down in section 11, paragraph 3(a) and (b). The issue for consideration is whether there is a sufficient legal basis for the Commission to make a preliminary assessment that the judicial process in Indonesia may satisfy these criteria, and that accordingly, the Special Panels may have jurisdiction to try these individuals either for the same crimes or the same conduct.

398. The principle *ne bis in idem* protects a person from being judged twice for the same criminal *conduct* (rather than the same *crime*), within the jurisdiction of one State and, in certain cases such as extradition, as between two States. The principle has strong international recognition in international human rights instruments and is also recognized in the domestic law of many countries, although variances in formulation across different national legal systems make it difficult to state authoritatively that the principle has the status of customary international law or of general principle of law.

399. The principle is widely known as such in civil law systems, and is analogous to aspects of the common law principle of “double jeopardy”, specifically the pleas of *autrefois acquit* and *autrefois convict* and the prohibition of multiple punishment. Together with a number of legal systems, the European Court of Human Rights recognizes exceptions to the principle *ne bis in idem* in cases of new or newly discovered facts, or fundamental defects in the previous proceedings which could affect the outcome of the case.

400. The Constitution of Timor-Leste includes a *ne bis in idem* protection in section 31(4), which provides: “No one shall be tried and convicted for the same criminal offence more than once”. This provision does not purport to apply to judgements of courts outside Timor-Leste; indeed, to apply it in relation to such judgements would be contrary to the intra-jurisdictional character of the *ne bis in idem* protection. Within the domestic legal framework of Timor-Leste, following the Statute of the International Criminal Court, two exceptions to *ne bis in idem* are recognized in section 11, paragraph 3, of UNTAET Regulation No. 2000/15, based on an assessment of the intent to bring the person concerned to justice: either where the previous proceedings had the purpose of shielding the person concerned from criminal responsibility; or where the previous proceedings were not

conducted independently or impartially in accordance with norms of due process recognized by international law.

401. This provision admits two exceptions to the principle *ne bis in idem*: the "shielding" exception; and the "due process" exception. The Commission takes the view that the phrase "the other court" refers to any court, within or outside Timor-Leste. This is consistent with the ordinary meaning of the text, in light of its context.[83] Furthermore, as discussed above, *ne bis in idem* is generally understood to apply within one jurisdictional regime only.[84]

402. The exceptions in section 11.3 of UNTAET Regulation 2000/15 have not been subject to jurisprudential treatment and their substantive content is uncertain in law.

403. In this regard, the Commission makes reference to an informal expert reflection paper prepared at the invitation of the start-up team of the Office of the Prosecutor of the International Criminal Court, in 2003.[85] While focusing on the issue of a State's unwillingness to investigate or prosecute in the complementarity context, rather than addressing *ne bis in idem* provisions per se, the reflection paper gives extensive consideration of the substantive content of the "shielding" and "due process" exceptions. The reflection paper recommends that an assessment of the exceptions should be based on *procedural* and *institutional* factors, rather than the substantive outcome of particular cases; involving a search for *indicia*, for example, of a purpose of shielding or a lack of intent to bring the person concerned to justice.

404. In evaluating whether there is a legal basis to make a preliminary assessment that the trials conducted before the Ad Hoc Court may satisfy the criteria in section 11.3. of UNTAET Regulation No. 2000/15, the Commission has examined the available facts for evidence of an extensive set of *indicia*.[86] The presence of a number of these *indicia* leads the Commission to find a sufficient legal

[83] Note that the preceding section, 11.2, in contrast to section 11.3., refers specifically to "another court (in East Timor)".

[84] The Commission has noted that the KPP HAM completed its work in January 2000 and would have forwarded its report to the Office of the Attorney-General. Regulation 2000/15 was passed in June 2000. It is reasonable to conclude that the drafters of the UNTAET regulation would have been aware that the Indonesian authorities were investigating for purposes of prosecution the same crimes that the serious crimes process in Timor-Leste was intended to address.

[85] www.icc-cpi.int/otp/complementarity.htm.

[86] These indicia include: the degree of independence of judiciary, of prosecutors and of investigating agencies; procedures of judicial and prosecutorial appointment and dismissal; the nature of judicial and prosecutorial governing bodies; whether there are patterns of political interference in investigation and prosecution; whether there are patterns of trials reaching pre-ordained outcomes; whether there is a commonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication, considering coincidences in objectives as between State authorities and suspected perpetrators (such as mutually-beneficial political gains, territorial goals or subjugation of particular groups); official statements (condemning or praising actions); awards or sanctions, promotion or demotion; financial support; and deployment or withdrawal of law enforcement, inhibiting or supporting investigation; the degree of proximity or rapport between authorities and suspected perpetrators; the number of investigations opened (in proportion to number of crimes alleged and available resources); the resources allocated to investigation and prosecution; the pacing and development of investigation; whether actual investigative steps taken were manifestly insufficient in the light of the potentially available steps; or whether evidence gathered was manifestly insufficient in the light of evidence that another prosecuting body can show is available; the adequacy of charges and modes of liability vis-à-vis the gravity of the alleged crimes and available evidence; whether the evidence introduced at trial was manifestly insufficient in the light of the evidence collected; whether inculpatory evidence was ignored or downplayed; whether exculpatory evidence was exaggerated; whether the overall situation was consistently characterized in a misleading way, e.g. avoiding obvious proof of State involvement; whether victims and witnesses were intimidated or discouraged from participating; whether reasonable steps were taken to protect witnesses from being intimidated by third parties; whether there were obvious departures from normal procedures, showing unusual lenience and deference to the accused; and whether legal findings were markedly and consistently slanted in favour of one party to the proceedings.

basis to make a preliminary assessment that certain proceedings before the Ad Hoc Court would fall within the criteria set forth in section 11.3 of UNTAET Regulation 2000/15, and thus that the Special Panels may find jurisdiction to re-try the individuals charged in such proceedings. This analysis may also be applicable to other States which have similar legislative provisions.

405. Next, the Commission is required to consider whether the acquittals by the Ad Hoc Court and higher courts may constitute a bar to subsequent proceedings in Timor-Leste on the grounds that the subsequent proceedings would cover the same conduct for which the accused faced trial before the Ad Hoc Court. The Commission concludes that the acquittals in the Abilio Soares, Adam Damiri and Noer Muis cases may not offend the *ne bis in idem* principle because the conduct with which the individuals were tried before the Ad Hoc Court is different, at least in part, from the conduct for which these individuals have been indicted before the Special Panels. Similar principles may also be applied to other individuals who have been tried before the Ad Hoc Court and indicted by the SCU. The following table sets out the distinctive conduct charged before each of the two judicial processes:

Accused	**Trials before the Ad Hoc Court**	**SCU indictments**
Abilio Soares Convicted at trial and sentenced to 3 years imprisonment. Acquitted on appeal.	Two cumulative charges of murder as a crime against humanity and assault / persecution based on the same events. Persecutions limited to murder and physical threats and assault. Crimes occurred between 4 April 1999 and 6 September 1999. Mode of liability: command responsibility Crimes relate to the Liquiça Church, Dili Rally and attack on the Carrascalao House and the Ave Maria Church (Suai).	Three cumulative charges of murder, deportation and persecution as crimes against humanity. Crimes occurred between 12 April 1999- and 7 September 1999. Mode of liability: individual responsibility. The murder charge is based on eight incidents (5 additional events); The deportation charge occurred in 12 districts; The persecution charge included a wide-ranging conduct such as the murders, physical assaults and threats, unlawful detentions, destruction of personal and government property, destruction of religious sites and monuments.

Adam Damiri Convicted at trial and sentenced to three years imprisonment. Acquitted on appeal.	Two charges of murder and assault/persecution as crimes against humanity. Crimes occurred between 6 April 1999 and 6 September 1999. Mode of liability: command responsibility Crimes relate to Liquiça Church, Dili Rally and attack on the Carrascalao House, attack on Dili Diocese and Bishop Belo's Residence and the Ava Maria Church (Suai).	Three charge of murder, deportation and persecution as crimes against humanity. Crimes occurred between April and September 1999. Mode of liability: individual responsibility and command responsibility. The murder charge relates to eight separate incidents; The deportation charge covers 12 districts; The persecution charge includes murders, physical assaults and threats, unlawful detentions, destruction of personal and government property, destruction of religious sites and monuments.
Noer Muis Convicted at trial and sentenced to five years imprisonment. Acquitted on appeal.	Two cumulative charges of murder and persecution/ assault as crimes against humanity . Crimes occurred between 5 September 1999 and 6 September 1999. Mode of liability: command responsibility Crimes relate to attack on Dili Diocese and Bishop Belo's residence, and the Ava Maria Church (Suai).	Three cumulative charges of murder, deportation and persecution as crimes against humanity. Crimes occurred between 13 August 1999 and 2000. Mode of liability: command responsibility The murder charge relates to seven incidents (i.e. 5 additional incidents); The deportation charge covers 12 districts; The persecution change encompasses murders, physical assaults and threats, unlawful detentions, destruction of personal and government property, destruction of religious sites and monuments

Table 3

406. The Commission's recommendations are set out in chapter IX of this Report.

C. Options relevant to both judicial processes

1. Establishment of an international criminal tribunal by the Security Council under Chapter VII of the Charter of the United Nations

407. One of the insurmountable challenges confronting the SCU is its inability to extract indictees seeking refuge in Indonesia and elsewhere. There is presently no legal apparatus available to compel Indonesia to arrest and transfer indictees to the Special Panels. The absence of enforcement powers have led to consistent calls for the creation of an international criminal tribunal by the Security Council, under the legal authority of Chapter VII of the Charter. Proponents refer to the two ad hoc international criminal tribunals, ICTY and ICTR, both of which were established pursuant to Security Council resolutions under Chapter VII.[87]

408. In relation to the socio-political situation in Timor-Leste, the Commission has established the following:

- A situation of impunity prevails in Timor–Leste and Indonesia in connection with serious violations of human rights committed in 1999;
- Government of Timor-Leste has expressed security concerns at the West Timor border, citing possible regrouping of militias;
- The Timorese people have expressed concerns that indictees and suspects who have fled across to West Timor might return for personal reasons or otherwise and that some cross-border incursions have in fact occurred;
- Timorese victims of serious violations of human rights in 1999 and NGOs have warned of possible reprisal attacks if perpetrators are not brought to justice;
- The absence of an effective legal basis for the judicial process in Timor-Leste to arrest those deemed most responsible for serious violations of human rights is a constant source of frustration and discontentment for the victims and victims' families;
- The existence of a reconciliation process in Timor-Leste has been successful in securing meaningful reconciliation in Timor-Leste, predominantly between the victims and perpetrators of less serious crimes;
- Although a cordial and friendly relationship between Indonesia and Timor-Leste is welcome, recalling the expressed intent of the two Governments to cooperate at all

[87] The tribunals created by the Security Council have enforcement powers deriving from their mandate under Chapter VII. For example, the Statute of the International Criminal Tribunal for Rwanda requires Member States to cooperate with the Tribunal's investigations and the prosecution of accused persons, by complying with the Tribunal's orders or requests to identify, arrest, detain and surrender them to the Tribunal. Security Council resolution 955 (1994) of 8 November 1994, which established the ICTR, is binding on all Member States. If a State does not cooperate with the Tribunal in accordance with article 28 of the Statute, the President of the Tribunal may, under article 7bis of the Rules of Procedure and Evidence, report that State to the Security Council for appropriate measures to be taken. ICTY shares the same enforcement mechanism.

levels, the Government of Timor-Leste is still seeking ways to ensure that Indonesia acknowledges the role of the State in the commission of serious human rights violations, and that such acknowledgment is a key condition for the useful and effective functioning of the Commission of Truth and Friendship.

409. In light of these considerations, the Commission will now examine whether the establishment of an international criminal tribunal is the best mechanism to address the prevailing situation of impunity in Indonesia and Timor-Leste. In this regard, it is pertinent to trace briefly the historical background and circumstances leading to the creations of the first international tribunals since Nuremberg.

410. In February 1993, war in the former Yugoslavia was still raging and grave breaches and other violations of international humanitarian law such as "ethnic cleansing", mass killings, torture, rape and property destruction were being committed on a massive scale. The war ended only with the signing of the Dayton Peace Agreement in December 1995.

411. In the case of the former Yugoslavia, the Commission of Experts on the former Yugoslavia *did not* recommend the establishment of an international criminal tribunal; rather, this decision was taken by the Security Council upon consideration of several reports, including the first interim report of the Commission of Experts on the former Yugoslavia.[88] At the same time, the International Conference on the former Yugoslavia recommended the establishment of an "international criminal court". Against this background, the Security Council adopted resolution 808 (1993) in 22 February 1993, determining that the situation in the former Yugoslavia constituted a threat to international peace and security, and stating that it was determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them. The Security Council found that in the particular circumstances of the former Yugoslavia, the establishment of an international criminal tribunal would achieve this aim and would contribute to the restoration and maintenance of peace.

412. In November 1994, the Security Council, in response to one of the worst genocidal killings in history, established a similar tribunal for Rwanda, where more than half a million Tutsis and moderate Hutus were massacred in the summer of 1994. By November 1994, the Security Council had found that the situation in Rwanda continued to constitute a threat to international peace and security and decided to establish the tribunal.

413. The Commission concludes that the overarching rationale for the creation of these ad hoc tribunals was to break the cycle of impunity and restore sustainable peace to the regions affected.

414. In contrast, the recent International Commission of Inquiry on Darfur strongly advised against the establishment of an ad hoc international criminal tribunal for Darfur, on three principal grounds: cost, length of proceedings, and absence of political will.

[88] The Security Council took note of several reports from France, Italy and Sweden, detailing modalities of the court. The French report was premised on the principle of universal jurisdiction over war crimes and crimes against humanity. It debated other alternatives such as the establishment of hybrid national tribunals or a treaty-based court. These options were dismissed as they depended on the goodwill of States, which were deemed ineffective under the circumstances and a treaty was deemed too time-consuming to negotiate.

415. Drawing upon the experiences of ICTY and ICTR, those who oppose the establishment of an international criminal tribunal for Timor-Leste have cited prohibitive costs and the slow progress of previous tribunals in delivering justice. The Commission bears in mind, nonetheless, that both ad hoc international criminal tribunals have made significant contributions in establishing an accurate historical record of the conflicts in the former Yugoslavia and Rwanda, bringing justice to the victims, strengthening the rule of law in the respective jurisdictions and contributing to the restoration of relations between people who were previously in conflict.

416. Proponents of an international criminal tribunal for Timor-Leste have argued that it is only under the legal authority of Chapter VII that States are compelled to cooperate with an international court. The Commission accepts that a Chapter VII mandate, in abstract terms, offers the most potent enforcement mechanism available under international law.

417. However, the experience of ICTY has shown that a legal foundation in Chapter VII may not necessarily guarantee effective enforcement *in practice*. ICTY does not have an international police force to arrest and transfer indictees seeking refuge in the former Yugoslavia. In the 1990s, it was unclear whether the force mandates of IFOR/SFOR, the forces led by the North Atlantic Treaty Organization (NATO) Interim Force (IFOR) and the Stabilisation Force (SFOR) permitted these bodies to carry out coercive arrests on ICTY's behalf.

418. The authority of IFOR/SFOR is based on a resolution of the North Atlantic Council of 16 December 1995. Pursuant to the provisions of the General Framework Agreement for Peace in Bosnia and Herzegovina, NATO was empowered to cooperate with ICTY and encourage the restoration and maintenance of human rights.[89] Arrests were then carried out by ICTY personnel on the basis of Rule 59 *bis* of the ICTY Rules of Procedure and Evidence.

419. To date, ICTY has been largely successful in extracting all levels of indictees from the former Yugoslavia through a suite of enforcement measures, political force and negotiations, but has not been able to arrest some of the most wanted individuals.

420. The experience of ICTY has shown that there is no guarantee that a Chapter VII mandate ensures State cooperation with international criminal tribunals, in particular concerning high-level accused, if there is absence of an effective enforcement force and lack of political will on the part of the concerned State or States. The main incentive available to the international community to compel a State to cooperate with Security Council action under Chapter VII is sustained and concerted political pressure from the international community, and the imposition of sanctions on the non-cooperating State by the Security Council.

421. Apart from the creation of international criminal tribunals, the Security Council has also acted under Chapter VII to address the specific problem of unwillingness to extradite suspects for trial. The Commission considers it useful to review examples of such enforcement action.

[89] Force commanders in the field over time came to interpret these powers more robustly and determined that their duties of cooperation with ICTY could properly extend to detaining ICTY indictees.

422. In resolution 731(1992) of 21 January 1992, the Security Council urged the Government of the Libyan Arab Jamahiriya "immediately to provide a full and effective response" to requests for extradition of terrorist bombing suspects from France, the United Kingdom and the United States of America. Two months later, in resolution 748 (1992) of 31 March 1992, the Security Council noted that the Libyan Arab Jamahiriya had yet to respond to such requests and acted under Chapter VII to decide that it must comply without delay, imposing a set of enforcement measures including, inter alia, a reduction in foreign diplomatic presence in the Libyan Arab Jamahiriya.

423. In resolution 1044 (1996) of 31 January 1996, the Security Council called upon the Government of the Sudan to "undertake immediate action to extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan and wanted in connection with the assassination attempt on the basis of the 1964 Extradition Treaty between Ethiopia and the Sudan." Three months later, in resolution 1054 (1996) of 26 April 1996, the Security Council expressed its deep alarm that the Government of the Sudan had "failed to comply" with this request and determined that its non-compliance constituted a threat to international peace and security. Acting under Chapter VII, the Security Council demanded that the Sudan "take immediate action to ensure extradition to Ethiopia for prosecution of the three suspects sheltering in Sudan", and decided to impose a suite of enforcement measures including, the reduction of diplomatic presences in the Sudan, travel restrictions on senior officials and members of the armed forces, and a call to international and regional organisations not to convene conferences in the Sudan.

424. By resolution 1267 (1999) of 15 October 1999, the Security Council acted under Chapter VII to demand that the Taliban authorities in Afghanistan "turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice." By resolution 1333 (2000) of 19 December 2000, the Security Council determined that the failure of the Taliban authorities to comply with this demand constituted a threat to international peace and security, and accordingly, imposed a suite of enforcement measures, including, the reduction of foreign diplomatic presences in Afghanistan, closure of Taliban offices and offices of the national airlines, freezing of assets and travel restrictions on senior officials.

425. The Commission notes that Security Council action to require extradition of suspects has generally occurred in the context of combating international terrorism. However, the Prosecutor for the Sierra Leone Special Court has recently raised the possibility of a Chapter VII Security Council Resolution to compel Nigeria to arrest and transfer wanted fugitive Charles Taylor to the Special Court.[90]

426. The Commission will now consider Security Council practice specifically addressing the situation in Timor-Leste since 1999. Following the conclusion of the popular consultation in Timor-Leste on 30 August 1999, the Security Council adopted Resolution 1264 (1999) on 15 September 1999, in which it expressed "concern at reports indicating that systematic, widespread and flagrant

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90 Desmond de Silva, QC, interview with the British Broadcasting Corporation, May 2005

violations of international humanitarian and human rights law have been committed in East Timor", and stressed that "persons committing such violations bear individual responsibility".[91]

427. The Security Council determined that the situation in Timor-Leste at the time – which included deterioration in the security situation, continuing violence and large-scale displacement and relocation of civilians – constituted a threat to international peace and security. Acting under Chapter VII of the Charter, the Security Council condemned all acts of violence in East Timor, called for their immediate end and demanded that *those responsible for such acts be brought to justice*. The Security Council decided to remain "actively seized of the matter".

428. In a letter dated 18 February 2000 from the President of the Security Council to the Secretary-General (S/2000/137), acknowledging receipt of the Report of the International Commission of Inquiry on East Timor, the President observes that "grave violations of international humanitarian and human rights have been committed; those responsible for these violations should be brought to justice as soon as possible". The President conveyed the shared belief of the members of the Security Council that the "United Nations has its role to play in this process in order to help safeguard the rights of the people of East Timor".

429. In resolution 1319 (2000) of 8 September 2000, the Security Council recalled the letter of the President of the Security Council and reiterated its belief that the United Nations has "a role to play in the process in order to safeguard the rights of the people of East Timor". Responding to a series of attacks against international staff and refugees in West Timor, the Security Council stressed that "those responsible for the attacks on international personnel in West and East Timor must be brought to justice", and that it would remain "seized of the matter".

430. In its resolution 1338 (2001) of 31 January 2001, the Security Council emphasized the need to "address shortcomings in the administration of justice in East Timor, particularly with a view to bringing to justice those responsible for serious crimes in 1999". The Security Council remained "actively seized" of the matter.

431. The Security Council established UNMISET by resolution 1410 (2002), in which it emphasized the critical importance of cooperation between the Governments of Indonesia and Timor-Leste, as well as cooperation with UNMISET, in all aspects, including the implementation of that and other resolutions, in particular by ensuring that those responsible for serious crimes committed in 1999 are brought to justice.

432. On the basis of the foregoing analysis, the Commission concludes that in exceptional circumstances, it has been the practice of the Security Council to act under Chapter VII to adopt a spectrum of measures addressing impunity, law enforcement and policing, criminal adjudication and administration of justice. In specific contexts, the Security Council has required the extradition of suspects for trial. Particular attention has been given to prevailing situations of impunity and the importance of accountability for serious violations of human rights in maintaining international

[91] The practice of the Security Council relevant to the situation in Sierra Leone also indicates deep concern for the "prevailing situation of impunity", and recognizes that accountability for "very serious crimes" bringing about an end to impunity would contribute to the "restoration and maintenance of peace"; see Security Council resolution 1315 (2000) of 14 August 2000.

peace and security. Concerning Timor-Leste, the Security Council has acted under Chapter VII to demand that those responsible for the violence in Timor-Leste in 1999 be brought to justice.

433. Nonetheless, although the Security Council is mandated with far-reaching powers under Chapter VII, they are to be exercised only when the Council determines "the existence of any threat to the peace, breach of the peace, or act of aggression".

434. The Commission will now turn to consider whether the establishment of an international criminal tribunal for Timor-Leste is a feasible option. In its deliberations, the Commission has considered several factors including , but not limited to:

- The effectiveness of alternate justice mechanism at the national level, emphasising the primary responsibility of States to ensure the effective investigation and prosecution of serious crimes of concern to the international community as a whole;
- The availability of alternate justice mechanisms at the international level, considering in particular the jurisdiction *rationae temporis* of the International Criminal Court and exceptions to the *ne bis in idem* principle under international law and the law of Indonesia and Timor-Leste;
- The effectiveness of existing or proposed enforcement mechanisms, either at the national, bi-lateral or international level to assist in the investigations, arrests and detention of fugitives outside the judicial reach of an international criminal tribunal;
- The gravity and scale of the crimes committed and categories of potential offenders, considering that an international criminal tribunal is well-placed to deliver specialized legal and investigative expertise to efficiently conduct complex and time-consuming prosecutions and adjudicate serious violations of human rights of those who bear the greatest responsibility for such crimes;
- As a pertinent but not determinative consideration, the degree of a commitment on the part of Member States to fund the creation and maintenance of an international criminal tribunal over a minimum period of at least five years.[92] This would include an establishment period of at least a year to resolve modalities such as securing premises, to obtain funding and hiring of competent, specialized staff.

435. The Commission also makes three specific observations relevant to the establishment of an international criminal tribunal for Timor-Leste.

436. First, the Security Council must make a determination and impose enforcement measures, if any, under Chapter VII as it did in resolution 1264 (1999).

437. Second, in the context of Timor-Leste, there is no existing regional enforcement mechanism such as the SFOR and IFOR. If an international criminal tribunal is recommended to address the crimes committed in Timor-Leste in 1999, Member States and the international community as a

[92] The ICTY and ICTR annual budget is more than US$100 million. The two Tribunals are funded by a specific fund contributed by member States. In 2004, both Tribunals suffered a crippling recruitment freeze when there was a failure by States to pay their contributions to the Tribunals.

whole have to be galvanized to ensure the arrest and transfer of suspects from Indonesia and other Member States. In this regard, the Commission has been informed, from a number of sources, that there is "no political appetite" among some Member States for the creation of another tribunal. The Commission takes the view that the prevailing international political climate should not, in itself, constitute an impediment to the establishment of an international criminal tribunal. However, the Commission is concerned that without concerted international support, an international criminal tribunal for Timor-Leste would be unable to effectively secure the presence of accused from outside the territory of Timor-Leste, which would thwart a principal objective for its establishment under Chapter VII.

438. Third, an international criminal tribunal, independent and severed from national judicial processes and sited outside the territory of Timor-Leste, is not the most effective mechanism to contribute to building the capacity of the judicial system in Timor-Leste and strengthening the judicial system of Indonesia. This is a significant drawback that the Commission must consider.

439. The Commission concludes that it is entirely possible to import the constitutional and structural personality of a traditional international criminal tribunal into a streamlined version of an international criminal tribunal, focusing on specific jurisdictional and temporal parameters. In the case of Timor-Leste, much of the investigative groundwork has been completed. The SCU has completed a significant part of its investigations into the 1999 crimes and have, at present, staff members fully familiar with the spectrum of work of the SCU.

440. The Commission emphasizes that should this option be recommended and retained, the main priority of the prosecution must be to formulate a strategy to identify and pursue those who bear the greatest responsibility for serious crimes committed in 1999. In essence, the completion strategy of the revised serious crimes process should comprise of two pillars of achievements: the fair and expeditious completion of the trials of those who bear the greatest responsibility in accordance with a designated time-line and the transition from international to domestic prosecution. The Commission sees a clear need for a plan to restructure and realign international resources to achieve the latter objective at an appropriate time.

441. The Commission has carefully considered all the factors in support and against the establishment of an international criminal tribunal for Timor-Leste and concludes that it is a feasible option.

2. Establishment of an international criminal tribunal by the Security Council under Chapter VII of the Charter of the United Nations via extraordinary agreement with the International Criminal Court

442. The Commission will now consider a proposal for the establishment of an international criminal tribunal by the Security Council under Chapter VII of the Charter, with its functions being "contracted" to the ICC via an extraordinary agreement with the United Nations.[93] The international criminal tribunal would exist as a legal entity but its Judges, staff, and premises would be those of

93 This proposal has been presented for the consideration of the Commission in a confidential preliminary inquiry at the request of the Office of the High Commissioner for Human Rights by Mr. Grant Niemann.

the ICC. To limit the costs associated with establishing an international criminal tribunal (borne by Member States), the United Nations would only pay for those services actually rendered by the ICC on its behalf, including the completion of some or all of the outstanding indictments and the trial of any persons who are subsequently arrested. It is implied that the relevant Security Council Resolution would provide the necessary authority for the ICC to enter into such an arrangement outside of framework of the Rome Statute.[94]

443. The Commission is nonetheless cognizant of a number of legal issues which may arise were this option to be retained. As noted above, although the Security Council is mandated with far-reaching powers under Chapter VII, these are to be exercised only when the Council determines "the existence any threat to the peace, breach of the peace or act of aggression."

444. The Commission also realises that as an independent international organization, the ICC itself may not be bound by the terms of a Security Council Resolution requiring it to enter an extraordinary agreement with the United Nations, although such a Resolution may bind the States Parties to the Rome Statute as Member States of the United Nations. It would appear that Security Council practice is to "call upon" international organisations to implement SC Resolutions rather than requiring them to do so.[95]

445. Finally, the Commission notes that the ICC is endowed with international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.[96] As an international organization, its legal capacity (including its capacity to enter into arrangements, agreements, "contracts" etc.) depends on "its purposes and functions as specified or implied in its constituent documents and developed in practice".[97] The issue of whether the ICC has the international legal capacity to enter into the proposed extraordinary agreement (given the terms and purposes of its constituent documents and its practice to date) is very much debatable.[98]

3. Referral of the situation to the International Criminal Court by the Security Council under Chapter VII of the Charter of the United Nations

446. As the world's first permanent international criminal court with the necessary framework for State cooperation, infrastructure and specialized legal expertise to effectively investigate, prosecute and adjudicate cases of genocide, crimes against humanity and war crimes, the Commission considers that the ICC could be a potentially effective mechanism to address the prevailing situation of impunity in Timor-Leste and Indonesia.

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94 The Security Council retains "…a wide measure of discretion in choosing the course of action…" in the context of a Resolution under Chapter VII (*Tadić*, Appeals Judgement, paras. 28 ff). Thus, an appropriately-worded Security Council Resolution may implement such an option

95 See Frowein & Krisch, "Chapter VII: Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" in Bruno Simma, ed. Commentary on the Charter of the United Nations, p. 715

96 Rome Statute, Art. 4

97 See Advisory Opinion on Reparations, ICJ, para, 174 *ff*

98 e.g., the Relationship Agreement between the ICC and the United Nations, specifically foreseen in the Rome Statute, required the prior approval of the Assembly of States Parties of the ICC. Agreements entered into by the Prosecutor pursuant to his statutory authority under art. 54(3)(e) of the Rome Statute may not be inconsistent with the Rome Statute (including its provisions on temporal jurisdiction) and are limited to the purposes of securing co-operation from States and other actors for the conduct of investigations

447. The Commission notes that prevailing legal, institutional and governmental positions, at least those articulated publicly, indicate that the temporal jurisdiction of the ICC begins from the date of entry into force of the Rome Statute (namely 1 July 2002 for States parties to the Rome Statute at the time). Although, the Chambers of the ICC have not yet pronounced on this question, a limited body of specialized doctrinal commentary has considered the possibility that the ICC could exercise jurisdiction over crimes committed prior to the entry into force of the Statute, as the temporal jurisdiction of the ICC may be extended by referral from the Security Council or, in the alternative, may be interpreted as inapplicable to Security Council referrals.

448. The crimes committed in Timor-Leste in 1999 appear to fall outside the explicit temporal jurisdiction of the ICC, established in article 11 of the Statute.[99]

449. The Statute is an "international treaty" within the terms of article 2, paragraph 1, of the Vienna Convention on the Law of Treaties and in accordance with article. 28 of the Vienna Convention, the provisions of the Rome Statute do not bind States parties in relation to "any act or fact which took place or any situation which ceased to exist" before 1 July 2002. However, the principle of non-retroactivity contained in the Vienna Convention does not apply, according to its article 28, where "a different intention appears from the treaty or is otherwise established". Accordingly, an interpretation of the Statute in accordance with articles 31 et seq. of the Vienna Convention is required.

450. Article 11, paragraph 1, of the Statute provides that the jurisdiction *ratione temporis* of the ICC shall be limited to crimes committed "after the entry into force" of the Statute, that is, according to article 126, paragraph 1, from "the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, approval or accession". The Statute entered into force on *1 July 2002*. According to the ordinary meaning of article 11 then, the ICC "has jurisdiction only with respect to crimes committed after" 1 July 2002.

451. The non-retrospective jurisdiction of the ICC appears to be reinforced by the context in which article 11 operates, namely that of establishing *individual criminal responsibility* under the Statute. This is reflected by provisions on *nullum crimen sine lege*[100]) and *non-retroactivity ratione personae.*[101] It is certainly important not to conflate the concept of jurisdictional temporal competence[102] with general principles of criminal law,[103] however, the content of article 11 is

[99] Article 11 states that in relation to the jurisdiction *ratione temporis,* "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. Moreover, "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."

[100] "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court".

[101] ("No person shall be criminally responsible under this Statute for conduct prior to the entry into force of this Statute").

[102] See *Prosecutor* v. *Tadić*, Decision on the Defence Motion for an Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, para. 10 [and relevant jurisprudence of the Special Panels.

[103] See S. Bourgon, "Jurisdiction *ratione temporis*" in A. Cassese et al., eds., Commentary on the Rome Statute of the International Criminal Court (2002), p. 549.

indeed "substantively linked"[104] with the principles *nullum crimen sine lege* and non-retroactivity *ratione personae*.

452. There is no authoritative compilation of *travaux préparatoires* for the Statute that may serve as a supplementary means of interpretation in accordance with article 32 of the Vienna Convention. Nonetheless, references to drafts negotiated in advance of the Rome Conference may be instructive. The Draft Statute prepared by the Preparatory Committee on the Establishment of an International Criminal Court in 1998 and submitted to the Rome Conference, includes a draft article 8 addressing the relationship between the ICC and the Security Council. According to this draft provision, a Security Council referral would seize the ICC in respect of crimes within its jurisdiction *notwithstanding all significant jurisdictional preconditions* (such as State consent, State referral, territoriality, nationality *etc.*) *except temporal jurisdiction*, which was fixed from the date of entry into force of the Statute.[105] The formulation of the general rule on jurisdiction *ratione temporis* in draft article 8(1) was adopted verbatim by the Rome Conference. This supports the view that the non-retrospective character of the ICC was essential to the diplomatic compromise that allowed final agreement on the text of the Statute.

453. It is also relevant to this analysis to specify the legal framework governing referrals of "situations" by the Security Council to the ICC. Article 13 of the Statute provides:

"Article 13
Exercise of jurisdiction

> "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 [i.e. genocide, crimes against humanity and war crimes] in accordance with the provisions of this Statute if:
>
> […]
>
> "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations"

454. The qualifying phrase "in accordance with the provisions of this Statute" may be understood on its ordinary meaning to incorporate jurisdictional rules, including rules *ratione temporis* in article 11 of the Statute, discussed above.

455. The Commission now considers the possible retrospective jurisdiction *ratione temporis* of the International Criminal Court, i.e. extending prior to the date of entry into force of the Statute. Two principal doctrinal sources have adduced arguments in favour of such retrospective jurisdiction *solely* in the context of a referral from the Security Council. The first argument interprets Chapter VII and article 103 of the United Nations Charter to establish a legal basis upon which the *Security*

104 See S. Williams, "Article 11" in O. Triffterer, ed. The Rome Statute of the International Criminal Court: a Commentary (1999), p. 323.

105 See the report of the Preparatory Committee on the Establishment of an International Criminal Court (A/Conf.183/2/Add.1, 1998), p. 38.

Council could legitimately extend the scope of the temporal jurisdiction of the ICC,[106] while the second argument relies instead on an interpretation of the Statute to establish that *the limits on temporal jurisdiction in article. 11 of the Statute do not apply to referrals from the Security Council*.[107]

456. The first argument suggests that empowerment measures adopted in a referral resolution by the Security Council under Chapter VII would prevail over conflicting provisions in the Rome Statute according to article 103 of the Charter. However, the question will arise whether article 103 applies to judges in an intergovernmental jurisdiction in the same way as to Member States.[108]

457. The second argument suggests that article 11 of the Statute could be interpreted in such way as to be inapplicable to a Security Council referral under article 13(b), as the temporal limitations established in article 11 *as a whole* could be interpreted as nothing more that the necessary corollary to the rule forbidding the Court to act without the consent of the States.[109] Thus, as long as the Court finds that the situation referred by the Security Council respects the principle of non-retroactivity – that it, the situation involves conduct that was held to be criminal under valid rules of international law at the time of its commission – the referral may include crimes committed prior to the entry into force of the Statute. [110]

458. However, the Commission observes that the validity of either of the doctrinal arguments cited above depends upon the ambiguous character of the provisions of the Statute. Such an ambiguity can only be authoritatively settled by the ICC itself.

D. Options relevant to the SCU and Special Panels (Timor-Leste)

459. It is pertinent to recall the salient observations of the Commission in relation to the work of the SCU:

- The SCU has recorded significant achievements in relation to the completion of investigations into its priority cases, providing an appropriate forum for victims to contribute to the process of establishing the truth, and strengthening the rule of law in Timor-Leste;
- The SCU constitutes an indispensable component of the overall capacity-building programme of the United Nations in Timor-Leste;

[106] See M. Bergsmo, "Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and their Possible Implications for the Relationship between the Court and the Security Council" (2000), 69:1 *Nordic Journal of International Law*, vol 87, p. 110.

[107] L. Condorelli and S. Villalpando, "Can the Security Council Extend the ICC's Jurisdiction?", " in A. Cassese et al., eds., Commentary on the Rome Statute of the International Criminal Court (2002), p. 571 (see esp. p. 580 ffThe argument is elaborated further in L. Condorelli & S. Villalpando, "Referral and Deferral by the Security Council", " in A. Cassese et al., eds., Commentary on the Rome Statute of the International Criminal Court (2002), p. 627 (see esp. pp. 634-637.

[108] Bergsmo, supra.

[109] Condorelli and S. Villalpando , supra.

[110] Ibid. p. 637. It is uncontroversial the crimes against humanity were criminal under international law in 1999; see, e.g. *Tadić* Jurisdiction Appeal, supra , para. 138 ff.

- Although largely independent, the SCU falls under the overall supervision of the Office of the Prosecutor–General, whose prosecutorial decisions have to be consonant with State policy;

- The SCU is not itself empowered to transmit requests for arrest and transfer of indictees outside the jurisdiction of Timor-Leste; under the present arrangements, once a Judge of the Special Panels issues an arrest warrant for a suspect, the responsibility then rests with the Government of Timor-Leste to forward the request to Interpol.

1. Continuation of the work of the Serious Crimes Unit and Special Panels

460. The Commission has considered the option of retaining the serious crimes process. In the event this option is retained, the following constitute minimum requirements:

- Continuity of the work of the SCU and Special Panels for an additional period of at least two years. This period should allow the SCU to complete its investigations, including identification and return of remains to victims' families, considered further below;

- Adequate funding for the SCU, the Special Panels and existing judicial and prosecutorial training programmes for a minimum period of two years. There should also be incentives to recruit and retain additional highly qualified international staff in Timor-Leste;

- That the Governments of Timor-Leste and Indonesia be called upon to conclude an effective agreement, under the auspices of the United Nations, regarding mutual assistance in legal, judicial and human rights related matters as well as regarding extradition between the Governments of Indonesia and Timor-Leste,[111] in accordance with international standards, and that the United Nations monitor the effective ratification and implementation of the treaty within the domestic legal framework of both States;

- That the Government of Timor-Leste be called upon to amend existing legislation to implement efficient timeframes for the issuance of indictments, completion of investigations and applications for warrants of arrest, subject to extensions on showing of good cause;

- That the SCU submit a work plan and completion strategy for the resolution of pending investigations and prosecutions, within a specific period of time.

2. Internationalization of the Serious Crimes Unit

461. The Commission has considered whether it is practical to sever the SCU from its present supervisory structure in order to ensure the independence of its work from the Public prosecution Service. Having considered the relevant legislation, the Commission has concluded that the applicable legislative framework would not permit such an arrangement.

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[111] Such an agreement is called for in the preamble of the Memorandum of Understanding between the Government of Indonesia and UNTAET regarding Co-operation in Legal, Judicial and Human Rights related Matters (April 2000).

462. SCU was created by UNTAET Regulation No 2000/16, the transitional administrative arm of the United Nations that has since been replaced by UNMISET. Sections 5.1(a), 12 and 14.1 and 14.2 of Regulation No 2000/16 provide for the overarching administrative and supervisory authority of the Prosecutor-General over both the SCU and Ordinary Crimes Unit (OCU). In order to "sever" the SCU from the Public Prosecution Service, amendments have to be made to the UNTAET Regulations to eliminate uncertainty and clarify the role of the Office of the Prosecutor-General. However, UNTAET Regulations have now become part of the national laws of Timor-Leste and can only be amended by an act of Parliament.

463. The Commission further concludes that it would be impractical to internationalize the SCU by a Security Council action under Chapter VII without internationalizing the judicial arm of the serious crimes processes, namely the Special Panels. To ensure there is a legal basis to compel State cooperation, both judicial and prosecutorial organs would have to be internationalized, as some of the enforcement powers would have to be exercised by the judiciary and not by the prosecution.

464. The Commission is aware of the intention of the Government of Timor-Leste to repeal the UNTAET Regulations and to incorporate a serious crimes process into its domestic legal system. These changes are expected to occur sometime in 2005. In the present political climate, the Commission considers it unlikely that the Government of Timor-Leste would permit the existence of an internationalized prosecution unit for serious crimes within its jurisdiction.

465. Given these considerations, the Commission concludes that an "internationalized" or independent SCU is not a feasible means of addressing the prevailing situation of impunity in Timor-Leste and Indonesia.

3. Establishment of a hybrid criminal tribunal for Timor-Leste

466. The Commission has also assessed the feasibility of another variation of the international criminal tribunal, commonly termed a "hybrid tribunal", some variations of which are explored in detail below. The Commission considers that the following are relevant considerations[112] in determining whether a hybrid model is the more appropriate mechanism to address the prevailing situation of impunity in Timor-Leste and Indonesia:

- The willingness of the host State to enter into an agreement with the hybrid tribunal to provide it with administrative, enforcement and other support services;
- The needs and circumstances of the host State; to ensure that the existing criminal justice system can support and service the hybrid tribunal;
- The capacity of the hybrid tribunal to enter into agreements with States as may be necessary to exercise its functions, including extradition or transfer agreements; and
- The availability of sufficient funding, given that hybrid tribunals are usually financed by private donors and donor States.

[112] See also Suzannah Linton "Cambodia, East Timor and Sierra Leone: Experiments in International Justice", Criminal Law Forum 12, 2001 p. 243.

467. The Commission is also mindful that the International Commission of Inquiry on Darfur did not retain the option of a hybrid tribunal for Darfur, for the following reasons:

- The dependency of a hybrid tribunal on uncertain, voluntary contributions;
- The time required to negotiate an agreement with the United Nations to establish a hybrid tribunal;
- The involvement of persons with control over the State apparatus in the commission of crimes and the attendant danger to national judges sitting on a hybrid tribunal;
- The gross incompatibility with international norms of the national laws which the tribunal would have to implement; and
- The fact that the crimes committed fall within the jurisdiction *ratione temporis* of the International Criminal Court, whereas previous mixed tribunals were established to account for crimes falling outside the temporal jurisdiction of the ICC.

468. The Commission will now examine several models of hybrid tribunals that have been created in various jurisdictions to investigate, prosecute and adjudicate serious crimes.

469. The emergence of hybrid tribunals followed on the acknowledgement of the United Nations and international community that the two ad hoc tribunals were simply too costly and were taking too long to complete their mandates.

470. First, the Commission considers the War Crimes Chamber of the State Court of Bosnia and Herzegovina (BiH) (WCC), an "internationalized" national tribunal, which forms part of the completion strategy of ICTY.

471. The War Crimes Chamber was inaugurated on 9 March 2005, pursuant to legislation enacted by the Government in December 2004. It was viewed as a landmark event in the development of the rule of law in Bosnia and Herzegovina. In 2003, a detailed management plan was created through the close cooperation of Bosnia and Herzegovina's judicial and governmental institutions, the Office of the High Representative and ICTY. In 2003, the Security Council endorsed the creation of the Chamber as part of the completion strategy for ICTY, which was fully involved in the creation of the Chamber through various training programmes, transfer of documents and expertise and continued cooperation.

472. In the "Project Implementation Plan Registry Progress Report",[113] the Joint Conclusions between the ICTY and the Office of the High Representative in January 2003 recommended the establishment of a specialized chamber within the Court of of Bosnia and Herzegovina and a specialized war crimes department in the Prosecutor's Office of Bosnia and Herzegovina. The War Crimes Chamber Project was established to provide the system of justice of Bosnia and Herzegovina with the tools and capacity to ensure international standards in the prosecution and trial of war crimes. During the initial period, each of the (between four and six) trial and appeal panels will comprise two international judges and one national judge. The panels will, in due course, evolve into

[113] 20 October 2004 Edition.

panels with a majority of national judges and will finally be exclusively composed of national judges by the end of the Project period.

473. The project proposal and budget reflected the anticipated gradual phasing out of the international component from the Court, the Registry and Prosecutor's Office over the course of the five-year period.[114]

474. The Project paper outlines the time lines for implementation, which contemplates an incremental transition process - planning; development; implementation; management transition; international judges and prosecutors transition; and completion (January 2003- August 2009).

475. The philosophy underlying the inception of the War Crimes Chambers is that accountability for the gross violations of human rights that took place during the conflict is of concern to all humanity but ultimately remains the responsibility of the people of Bosnia and Herzegovina.

476. The second hybrid model examined is the Special Court for Sierra Leone, which was established by the Security Council to create an independent special court to prosecute persons who bear the greatest responsibility for serious crimes by way of an agreement between the United Nations and Government of Sierra Leone. [115]

477. The institutional framework of the Special Court requires independent judges to serve in the Trial and Appeals Chamber, consisting of United Nations-appointed judges forming the majority, and Sierra Leone appointees. The Agreement provides for the Secretary-General to appoint the Prosecutor and the Government of Sierra Leone to appoint the Deputy Prosecutor. Both are independent in the performance of their functions and are not to accept or seek instructions from any Government or any other source. The Prosecutor also has the discretion to recruit international and Sierra Leonean staff to assist him. Under the agreement, the Government of Sierra Leone assists in the provision of the necessary premises, but the expenses of the Special Court are borne by voluntary contributions from the international community. The Government of Sierra Leone has agreed to cooperate with all organs of the Special Court at all stages of the proceedings and to comply without undue delay to any request for assistance by the Special Court. The Agreement may be amended or terminated by consensus of the Parties.

478. The Special Court is unique in that it is founded on a contractual "agreement" between the United Nations and the Government of Sierra Leone and was incorporated into the legislation of Sierra Leone. However, it does not form part of the judiciary of Sierra Leone, and, as spelt out in part III of the Agreement, offences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone. The Act provides for mutual assistance provisions. For instance, requests for assistance are channelled through the Attorney-General, including for the arrest or detention of persons and transfer of indictees to the Special Court. The Special Court and

[114] At the donor' conference in October 2003, 16.1 million Euros were pledged for the first two years of the project with expected additional funding.

[115] "Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone," done at Freetown, Sierra Leone, 16 January 2002.

the national courts of Sierra Leone have concurrent jurisdiction, but the Special Court has primacy over the national courts in that it may request a national court to defer to its competence. [116]

479. Significantly, Article 9 of the Statute of the Special Court for Sierra Leone provides for an exception to the *ne bis in idem* rule since it allows the Special Court to re-assess the proceedings before national courts. Article 10 of the Statute provides that granting amnesty to any person falling within the jurisdiction of the Special Court shall not be a bar to prosecution. The Rules of Evidence and Procedure of the ICTR are applicable to the conduct of the legal proceedings before the Special Court.

480. Since the trials opened on 3 June 2004, the Special Court has received mixed reviews – some observed that the Court imposes a constrained time frame, jurisdiction and enforcement powers which weaken its ability to deliver justice. Others have observed that it is able to deliver justice more cost-effectively and efficiently than other ad hoc tribunals, by focusing on a limited number of perpetrators.[117]

481. The last hybrid model the Commission has reviewed was probably the first to be created. In February 2000, the United Nations Mission in Kosovo (UNMIK) set the precedent for the creation of probably the first hybrid judicial and legal system by inserting international judges and prosecutors ("Kosovo IJPs") into the Kosovo judicial system pursuant to UNMIK Regulation No 2000/6. Prior to this, under Regulation No 1999/5 "On the Establishment of an ad hoc Court of Final Appeal and an ad hoc Office of the Public Prosecutor", the Special Representative of the Secretary-General had established a Court of Final Appeal and a Public Prosecutor's Office.

482. The Special Representative of the Secretary-General was tasked with the appointment of the judges, with judges and prosecutors from Kosovo retaining exclusive jurisdiction for the administration of justice. As a result, some of these jurists, virtually all of whom were ethnic Albanians, failed to apply the law evenly for ethnic Serbian and Albanian Kosovars. In light of these problems and the obvious lack of sufficiently qualified and trained judges and prosecutors, UNMIK was compelled to introduce internationals into the legal framework and organization of Kosovo by adopting Regulation No 2000/6. Later however, UNMIK instituted special "64" Panels[118] to ensure that international judges constituted the majority in specific cases.

483. The "64" Panels are distinct from the other special panels in Bosnia and Herzegovina and Timor-Leste, the Special Court for Sierra Leone and the Cambodian Extraordinary Chamber in that the "64" Panels are ad hoc entities that apply the same laws as the Kosovar courts. UNMIK also created a revolutionary procedure, allowing international prosecutors the discretion to resurrect cases abandoned by the Kosovar judges through Regulation 2001/2.

484. To conclude, there are several reasons underlying the Commission's consideration for the hybrid justice mechanism in Timor-Leste.

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[116] Statute of the Special Court for Sierra Leone, art. 8.

[117] To date, the Special Court has indicted 11 individuals (with nine in custody) for charges of war crimes and other serious violations of international humanitarian law.

[118] So named after Regulation 2000/64.

485. First, the typical hybrid model would ensure complete independence of the prosecutorial and judicial organs from the executive branch of the Government of Timor-Leste. Second, this model allows the hybrid tribunal to enter into independent arrangements with third States, especially in relation to issuance of arrest warrants and forwarding arrest warrants to Interpol. Third, the United Nations and donor States would be responsible for the funding, resources and hiring of international staff. Fourth, it permits, albeit in a more limited form, capacity-building of local institutions and their participation in the justice process as a tribunal of this type may be able to recruit local staff and provide a carefully-designed training programme.

486. This hybrid model is also advantageous as it appears to be compatible with the existing national constitutional and legislative framework of Timor-Leste. Section 160 of the Constitution of Timor–Leste confers universal jurisdiction to either a national or an international court to try serious crimes such as genocide, war crimes and crimes against humanity. Section 163 of the Constitution, read in conjunction with section 10.4 of Regulation 11/2000, does not present a constitutional or legislative bar to serious crimes cases being adjudicated before an international court, once established.

487. Moreover, section 163 requires that the transitional judicial organization to judge serious crimes "…shall remain operational until such a time as the new judicial system is established and starts its function." The Commission notes that no new judicial system has been established to take over adjudication of serious crimes cases or would be established in the near future on the initiative of the Government of Timor-Leste.

488. However, if this hybrid model is adopted, close cooperation between the national authorities and the hybrid tribunal is essential. In this regard, the Commission notes two points of concern. First, domestic policy considerations may limit the ability of the Government of Timor-Leste to enter into a host country agreement with the United Nations; and second, the tribunal may not have the ability to enter into the relevant agreements with the Government of Indonesia. The Commission concludes that unless the international community is prepared to commit extensive funding and planning to the creation of a credible and operational hybrid judicial system in Timor-Leste, it would be impractical to expect that the authorities of Timor-Leste would undertake the financing and implementation of such a system on their own. These are significant obstacles that cannot be easily resolved in the near future.

489. The Commission takes the view that the structure and constitutional personality the Bosnian War Crimes Chambers should be considered among the most feasible justice initiatives that could be adopted in post-conflict situation for States wishing to investigate and prosecute serious violations of international humanitarian law within its own justice system, but lacking in expertise and infrastructure. This model allows the insertion of an international component within the national judicial system. This achieves the objective of enhancing a State's legal institutional capability and transferring expertise to enable the system to function on its own, in the course of a closely monitored implementation process.

490. Although the War Crimes Chambers is structurally analogous to the hybrid system that was in place in Timor-Leste, the Commission notes the comprehensive planning and preparation preceding the implementation of the War Crimes Chambers and the high operating costs that have to be

sustained over a period of at least five years. Moreover, this system is not likely to face enforcement obstacles in Bosnia and Herzegovina, as most of the suspects are in custody in the country or at ICTY.

491. In Chapter IX of this Report, the Commission has suggested a planning and implementation phase which would allow the continued assistance of internationals appointed by the United Nations, with an emphasis on capacity-building and training of national prosecutors, judges and lawyers. This mechanism would allow the Government of Timor-Leste to claim ownership and executive control over the judicial process.

VIII. The right of victims to reparations

492. The Commission is mandated to consider measures and mechanisms to secure justice for victims of serious violations of human rights in East Timor in 1999, and to promote reconciliation. The aims of justice and reconciliation are served not only through the investigation and prosecution of perpetrators but also through the implementation of the rights of victims, in accordance with international standards[119] as well as provisions of national law, where available, in Indonesia[120] and Timor-Leste.[121]

493. The Commission has sought and received the views of a number of victims and representatives of victims' groups in Timor-Leste – including victims of sexual and gender-based violence – relevant to the question of reparations.

494. The Commission is mindful that the legal framework of CAVR does provide for community reconciliation agreements and is advised that such agreements have, in certain cases, included measures of restitution or compensation for the victims of violations, including the families of those killed. However, as reconciliation measures are only available for conduct not amounting to "serious crimes", victims of the gravest violations of human rights would not receive any form of reparation through the CAVR mechanism.

495. The Commission notes that some victims of gross human rights violations have been able to receive assistance from the Urgent Reparations Scheme operated by CAVR, designed as an interim measure to address urgent needs of victims, without prejudice to their right to full reparations. The Commission reiterates that such interim assistance does not limit or substitute for the right of all victims of gross violations of international human rights and serious violations of international humanitarian law to adequate, effective and prompt reparation.

496. The Commission would envisage a potential role for the CTF in ensuring that the right of victims to reparation is implemented through measures of reparation, rehabilitation, satisfaction or guarantees of non-repetition. However, the Commission is also concerned that the CTF terms of reference do not establish a framework for the implementation of this right that satisfies international standards.

[119] According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the Commission on Human Rights at its sixty-first session, victims have a right to reparation from the State for acts or omissions amounting to violations which can be attributed to the State. The right to reparation may take several forms: restitution, compensation, rehabilitation, satisfaction and/or guarantees of non-repetition The Commission observes that Indonesia voted in favour of the Basic Principles. The Updated Set of Principles to Combat Impunity, welcomed by the Commission on Human Rights without a vote on 21 April 2005, reiterate the rights of victims to access justice, to reparation and to information and considered by the Commission in the context of the Commission of Truth and Friendship, below.

[120] According to article 35 of Act 26/2000, "every victim of a violation of human rights violations and/or his/her beneficiaries shall receive compensation, restitution and rehabilitation", which "shall be recorded in the ruling of the Human Rights Court". The Commission is concerned that none of the judgements of the Ad Hoc Court recording a conviction at trial for serious human rights violations provide for such measures of reparation.

[121] The right to reparation is not explicitly addressed in the Constitution of Timor-Leste, the Transitional Rules of Criminal Procedure or UNTAET Regulations relevant to the Special Panels. The Commission is not aware of any case before the Special Panels providing for or implementing a right to reparation for victims.

497. The Commission has also considered recommendations advocating other compensatory mechanisms, such as the establishment of an international civil tribunal or compensation commission. In light of the other available mechanisms set out in the recommendations of the Commission, the Commission does not advise the establishment of additional compensatory mechanisms at the present time. The Commission notes that reparations in the form of *individual* compensation could be pursued in addition to the criminal proceedings.

498. The Commission takes the view that, in the particular context of Timor-Leste, without prejudice to the realization of all rights of victims of violations, the implementation of the right of victims to adequate, prompt and effective reparation should prioritize particular measures of *collective* compensation, rehabilitation and satisfaction over the immediate term.

499. As a measure of collective compensation in kind and rehabilitation of particular urgency, the Commission urges the international community to provide the necessary means for the Government of Timor-Leste to strengthen available social services in districts particularly affected by the violations of 1999, through measures such as the strengthening of infrastructure and the establishment of schools and universities, hospitals, hospices, dispensaries or other measures as advisable to the Government. Should legal responsibility for violations in Timor-Leste in 1999 be attributed to a State, the costs for such assistance should be reimbursed by that State.

500. The Commission has also inquired into the issue of repatriation of human remains. The SCU mortuary (the only one in Timor-Leste) has custody of 47 sets of unidentified human remains related to SCU investigations and 50 sets of unidentified human remains related to national investigations agencies. The SCU is presently examining the most appropriate means of returning the human remains to the Timorese community. It should be allowed to complete the identification project with some assistance from organizations such as the International Commission for Missing Persons.

501. Accordingly, as a measure of satisfaction, the Commission takes the view that an appropriate authority should assist victims in the recovery, identification and reburial of the bodies of those killed, including, as soon as practicable, remains currently secured as evidence for completed cases before the Special Panels. Should legal responsibility for violations in Timor-Leste in 1999 be attributed to a State, the costs for such assistance should be reimbursed by that State.

IX. Recommendations

A. Recommendations relevant to Timor-Leste

502. The Commission has accorded much consideration to the efficacy and feasibility of all available options and will now turn to its final recommendations.

1. Continuation of the work of the serious crimes process (Serious Crimes Unit, Special Panels for Serious Crimes and Defence Lawyers Unit)

503. It is regrettable that although there are a substantial number of outstanding cases pending indictment, the serious crimes process is to be liquidated pursuant to Security Council resolutions 1543 (2004) of 14 May 2004 and 1599 (2005) of 28 April 2005. This would inevitably lead to a breakdown in the criminal justice system in Timor-Leste and encourage impunity, as those who have been indicted would escape trial and punishment.[122]

504. The Commission of Experts urges the Security Council to ensure that the SCU, Special Panels and DLU be provisionally retained until such time as the Secretary-General and Security Council have had an opportunity of examining the recommendations made in the report of the Commission.[123]

505. The Commission recommends that the Security Council ensure the continuity of the work of the SCU, Special Panels and DLU until such time as the investigations, indictments and prosecutions of those who are alleged to have committed serious crimes are completed.

506. In the alternative, if the above recommendation is not retained, the Commission strongly recommends that the United Nations set up a mechanism under which investigations and prosecutions of serious violations of human rights can be continued and completed. The Commission recommends the establishment of such a mechanism, allowing the Government of Timor-Leste to retain sovereignty over the justice process, permit institutional and capacity-building and allow the international community to assist in this process through funding, providing human resources and/or facilitating institution-building.

2. Continuation of the work of the Serious Crimes Unit, Special Panels and DLU by way of another justice mechanism

507. It is evident that the work of the serious crimes process in Timor-Leste is incomplete. In order to ensure that impunity does not prevail, the Commission sees a clear need for a continuing mechanism to bring those responsible for serious violations of human rights in 1999 to justice.

122 As discussed in chapter II on the serious crimes process in Timor-Leste above, international staff members of SCU and the Special Panels are currently engaged in training local staff, including those of the Ordinary Crimes Unit of the Office of the General Prosecutor.

123 On 29 April 2005, the Commission sent a letter to the Secretary-General, requesting that the Secretary-General take all necessary measures to suspend or delay the liquidation of the serious crimes process in Timor-Leste.

508. The Commission makes this recommendation primarily on the premise that the legal system and institutions of Timor-Leste do not yet have the capacity to continue the work of the SCU, Special Panels and DLU and that the Government of Timor-Leste will not support or cooperate with any other judicial mechanism affiliated with the United Nations. The emphasis of this recommendation is therefore placed on a significant capacity–building element and does not solely envisage the efficient completion of investigations and prosecutions.

509. It is essential that the Commission sets out the relevant draft organic laws currently tabled before Parliament. The success of the proposed justice mechanism depends on the approval by Parliament of these draft laws. In relation to the proposed prosecuting authority, the Parliament is currently debating a draft organic law for the Office of the Prosecutor.

510. This draft law regulates the structure and constitution of the prosecution office, including the Superior Council of Prosecutors. There is no explicit provision requiring the establishment of a specialized unit to deal with crimes such as crimes against humanity. The present draft of the law only provides that the prosecution service should be impartial (art. 2, para.2) and have the competence to “exercise the criminal action” and “represent and defend the interests of the State” (art. 3, paras. 1 (d) and 1 (a), respectively). The draft law requires a prosecutor to possess Timorese nationality (art. 54(a)) but also provides, in its chapter on transitional measures, for the possibility of making use of international prosecutors with a minimum of five years’ experience and from a civil law system or with considerable experience in comparative law, when required (art. 85). The Commission notes that the draft Penal Code of Timor-Leste includes international crimes such as genocide and crimes against humanity.

511. In light of the domestic legal framework and draft organic laws, the Commission has determined that a judicial mechanism structured along the Bosnian War Crimes Chamber model is the most feasible alternative of the options considered. The suggested modalities of this new system are as follows:

- That a new, specialized unit be created within the Office of the General Prosecutor to deal specifically with serious crimes as defined in the draft Penal Code of Timor-Leste;

- That the unit be structured under the executive authority of the General Prosecutor as currently provided for under UNTAET Regulations;

- That the unit recruit, in consultation with the United Nations and the Government of Timor-Leste, international prosecutors, investigators and requisite support staff to work together with local staff to assist in all aspects of investigations and prosecutions for a minimum period of two years, subject to further extension as required by the Government of Timor-Leste;

- That the international component be funded by the United Nations and other donors. In order to assist the Government of Timor-Leste in this regard, a donor fund should be established prior to creation of this unit;

- That the Government of Timor-Leste be encouraged to draft and implement a letter rogatory or mutual legal assistance arrangement with Indonesia to ensure that those at large outside the country be brought to Timor-Leste for prosecution. The agreement could cover, inter alia, the level of suspects Indonesia is willing to arrest and transfer to Timor-Leste for trial; and

- That the unit implement an incremental transition process as outlined in annex C to the report to ensure that the local staff will be sufficiently trained at the conclusion of the implementation period to be able to take over the serious crimes process. For instance, at the initial phases, this unit should be managed by an international prosecutor.

512. In relation to the judiciary, the Commission notes that the hiring of additional international judges is permitted under current UNTAET Regulations, without need for further amendments. The current constitutional and legislative framework requires that one Timorese judge is included in the Special Panels. This structure should be maintained, as it is compatible with the suggested implementation plan set out in annex C. Future legislative amendments would be required to ensure that the Special Panels are able to accommodate additional national judges at the conclusion of the implementation plan.

513. In relation to continuation of the work of Defence Lawyers Unit, the Commission also sees a clear need for international defence counsel to gradually transfer their case-load to co-counsel from Timor-Leste, while initially providing supervision and training, and later guidance and collegial advice.

B. Recommendations relevant to Indonesia

1. Reform of the judicial process and re-trial of persons indicted

514. The Commission recommends that Indonesia strengthen its judicial and prosecutorial capacity by assembling a team of international judicial and legal experts, preferably from the Asian region, to be appointed by the Government of Indonesia on the recommendation of the Secretary-General with a clear mandate to provide independent specialist legal advice on international criminal law, international humanitarian law and international human rights standards, including procedural and evidentiary standards.[124]

515. Since the trials undertaken by the Ad Hoc Human Rights Court were seriously flawed and not in conformity with national and international legal standards, the Commission recommends that the Attorney-General's Office comprehensively review prosecutions before the Ad Hoc Court and re-open prosecutions as may be appropriate, on the basis of additional charges, new facts or evidence or other grounds available under Indonesian law. The Commission recommends that the Office of the Attorney General review the KPP-HAM Report, with a view to issuing additional indictments as

[124] This would include legal research and drafting support for prosecutors in cases of serious violations of human rights, ensuring consistency in the legal theories advanced by the prosecution in indictments, selection of evidence and written submissions.

may be appropriate, considering the advice of the international legal advisory service recommended above.

516. If appropriate, the Commission recommends that de novo trials take place and that indicted persons be re-tried in accordance with acceptable national and international standards.

517. The Commission is also gravely concerned that high–level perpetrators such as those named in the *Wiranto et al.* indictment will not be brought to justice in Timor-Leste. The Commission makes the following recommendations in relation to the prosecution of high-level indictees who remain at large in Indonesia or elsewhere.

2. Prosecution of high-level suspects/indictees at large in Indonesia

518. The KPP HAM report has recommended that a number of individuals holding high-level Government posts be investigated. The Commission is unable to accept the reasons underlying the decision of the Attorney-General to decline proceeding against these individuals

519. The Commission takes the view that there is sufficient evidence accumulated by KPP HAM and the SCU for the investigation, indictment and prosecution of a number of these individuals, some of whom have been named in the *Wiranto et al.* indictment.[125]

520. The Commission has been advised that SCU case files and related materials are to be handed over to the Timorese authorities, in particular to the Office of the General Prosecutor. The Commission also notes that under the terms of reference of the Commission of Truth and Friendship, the Commissioners of that Commission are entitled to free access, in accordance with the law, to "all documents" of the Special Panels, which would probably include SCU materials.[126]

521. The Commission recommends that under the strict supervision, guidance and assistance of an appointed delegation of SCU staff members and/or other persons appointed by the United Nations, materials pertaining to the *Wiranto et al. indictment* be provided to the Attorney-General of Indonesia for investigation and prosecution.

522. This option must be discussed with the SCU/United Nations delegation to be based in Jakarta until the Attorney-General reaches a conclusion as to whether to prosecute or otherwise. The Commission emphasizes that this is an option that would require consultation with the SCU/United Nations delegation as there are witness protection issues, confidentiality and other security concerns that may arise.[127] The Commission suggests that the modalities of this option be resolved by the

125 Much of the evidence has been documented in the public version of the "Brief in support of the application for the issuance of an arrest warrant for Wiranto", Special Panels for Serious Crimes, Case No. 5/2003, 19 March 2004.

126 For instance, as outlined in Chapter II (C) of this Report, the Serious Crimes Unit had submitted to the Special panels binders of evidence (in redacted form) pertaining to the *Wiranto et al* indictment which are presently with the Special panels.

127 In the "Motion to request a warrant application hearing pursuant to sections 27.2 and 19(A) of UNTAET Regulation 2000/30, as amended by Regulation 2001/25" filed on 27 Jan 2004 , the Deputy General Prosecutor for Serious Crimes applied for a public oral hearing to present evidence substantiating the charges against Wiranto, while maintaining necessary measures to ensure the safety of witnesses. The proposed procedure was also to provide General Wiranto an opportunity to be represented at the hearing. The Motion was rejected inter alia, on grounds that the Transitional Rules of Criminal Procedure did not provide for such a hearing.

parties concerned. It must also be reiterated that this recommendation is to be implemented in conjunction with the Commission's recommendation that the Attorney-General review the KPP-HAM Report for evidence relating to the individuals charged in the *Wiranto et al* Indictment.

523. It is further recommended that the Government of Indonesia provide a comprehensive report to the Secretary-General on the outcome of its investigations concerning these individuals, detailing the reasons for its decision to prosecute or otherwise, including prospects of a re-trial of any of the individuals previously tried before the Ad Hoc Court.

524. It is recommended that the Government of Indonesia implement these recommendations within six months from a date to be determined by the Secretary-General.

C. Establishment of an international criminal tribunal for Timor-Leste

525. If for any reason the above recommendations relevant to Timor-Leste[128] and Indonesia are not initiated by the respective Governments within the time frames set out above, or are not retained by the Security Council, the Commission recommends that the Security Council adopt a resolution under Chapter VII of the Charter of the United Nations to create an ad hoc international criminal tribunal for Timor-Leste, to be located in a third State.

D. Utilising the International Criminal Court

526. If the establishment of an international criminal tribunal is not feasible, the Security Council may consider the possibility of utilising the International Criminal Court as a vehicle for investigations and prosecutions of serious crimes committed in East Timor.

E. Exercise of universal jurisdiction

527. *Notwithstanding* the recommendations above, the Commission observes that Member States of the United Nations may, in accordance with their respective national laws, lend their jurisdiction to the international community *at any time* to pursue the investigation and prosecution of persons responsible for serious violations of human rights in East Timor in 1999.

F. <u>Preservation of evidence</u>

528. The Commission recommends that the United Nations provide adequate facilities and sufficient resources to ensure accurate and complete documentation and preservation of evidence generated by the serious crimes process in Dili.

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[128] The Commission emphasises that the creation of the international criminal tribunal is not necessarily dependent on the implementation of the Commission's recommendations for Timor-Leste. The central objective of the incremental transition process is to strengthen institutional capacity. The investigation and prosecution of cases between Timor Leste and any international criminal tribunal may be resolved under provisions similar to Rule 11 *bis* of ICTY Rules of Procedure and Evidence.

E. Conclusion

529. In the course of its work, the Commission has examined all relevant matters arising out of the events that took place in East Timor in 1999, when innocent children, women and men were mercilessly massacred. The Commission wishes to emphasize the extreme cruelty with which these acts were committed, and that the aftermath of these events still burdens the Timorese society. The situation calls not only for sympathy and reparations, but also for justice.

530. No violation of human rights, no invasion of human dignity and no infliction of pain and suffering on fellow human beings should be allowed to go unpunished. While recognizing the virtue of forgiveness and that it may be justified in individual cases, forgiveness without justice for the untold privation and suffering inflicted would be an act of weakness rather than of strength.

531. The international community is fully aware of the story of murders, rape, torture and enforced disappearances of East Timorese in 1999 and before. These are crimes that extend beyond the responsibility of the Governments of Timor Leste and Indonesia. These are crimes that concern humanity. The Report of the Commission of Experts may provide the last opportunity for the Security Council to ensure that accountability is secured for those responsible for grave human rights violations and human suffering on a massive scale and delivery of justice for the people of Timor-Leste.

Justice P. N. Bhagwati — P N Bhagwati

Dr. Shaista Shameem — [signature]

Professor Yozo Yokota — [signature]

Geneva, 26 May 2005

Annexes A-C

Annex A - Selected Questionnaires

Annex B - Letter from the Catholic Church of East Timor

Annex C - Suggested Incremental transition process for new justice mechanism for Timor- Leste

Annex A

Questionnaire for Special Panels judges

Core achievements

Please provide feedback with substantiation on whether the SPSC have achieved at the minimum:

a) the establishment of the facts and providing a historical record of the nature of the events in 1999 and adequate documentation of the diverse nature of the crimes committed in 1999;

b) bringing justice to the victims and providing them an opportunity to contribute to the process of establishing truth eg by witnesses statements and court testimony and acceptance of their evidence by the Special Panels;

c) accomplishments in contributing to international humanitarian and international criminal law and setting legal and institutional precedents, if any;

d) to what extent has the justice process before the SPSC contributed to the restoration of peaceful and normal relations between the people who were previously in conflict;

e) to what extent has the judicial process at the SPSC strengthened the rule of law in Timor-Leste.

Adequacy of legislation

Q: Is the legal framework (eg UNTAET Regulations) adequate, sufficiently clear and comprehensive to enable the SPSC to discharge its mandate?

Q: Has there been any confusion or inconsistency arising out of the concurrent application of the UNTAET Regulations and Indonesian subsidiary laws?

Court administration generally

Does the Registry provide adequate assistance and support to the work of the Special Panels? What are the areas of improvement?

Are all fundamental administrative needs of the Special Panels adequately attended to including hiring and training of staff?

Fair trial rights

What are some of the areas of improvement in relation to preserving the fair trial rights of an accused before the Special Panels?

Judicial resources

What were the problems and obstacles faced by the judges in the early stages and has there been improvement since then?

What are the areas that are presently under resourced?

Do judges have sufficient access to research facilities, legal researchers and clerks to assist with the trial proceedings, decisions and judgements?

Is there adequate management of the Special Panels' work plan and trial schedules?

What are some of the more critical problems with the present structure and organisation of the SPSC?

Trial proceedings

What are some of the current problems faced by the judges during trial proceedings eg in relation to interpretation facilities?

Do judges get adequate assistance and co-operation in general from the Office of the General Prosecutor and Public Defender's Unit in the conduct of the trials?

What were some of the causes for delays and adjournments during trial proceedings?

Post May 20 handover procedures

Please elaborate on the institutional capability or otherwise of the District Courts to take over all pending and current special panels cases after May 20.

What are the areas of expertise that are under-resourced and that would require more funding and assistance?

What is the present state of funding (committed or pledged) from voluntary donations and from the national budget?

What are the District Court's expectations on the UN's role and commitment after May 20?

What is the projected work-plan and deadline for completion of trials *assuming* the present system is retained?

Statistics

Please provide a chart on the organisation structure of the judicial system in Tmor-Leste and the District Courts in Dili and composition of staff at each level.

Please provide complete and up to date statistics on completed and pending trials and appeals, composition of Special Panels and list of cases which have been assigned to a Special Panel.

Please provide statistics on the number and type of written decisions and Judgements rendered by the Special Panels at both trial and appeals level.

<u>Questionnaire for Serious Crimes Unit and related departments</u>

<u>Core achievements</u>

Please provide feedback with substantiation on whether the SCU and SPSC have achieved at the minimum:

f) the establishment of the facts and providing a historical record of the nature of the events in 1999 and adequate documentation of the diverse nature of the crimes committed in 1999;

g) bringing justice to the victims and providing them an opportunity to contribute to the process of establishing truth eg by witnesses statements and court testimony and acceptance of their evidence by the Special Panels;

h) accomplishments in contributing to international humanitarian and international criminal law and setting legal and institutional precedents, if any;

i) to what extent has the justice process before the SPSC contributed to the restoration of peaceful and normal relations between the people who were previously in conflict;

j) to what extent has the judicial process at the SCU and the SPSC strengthened the rule of law in Timor-Leste.

<u>Effectiveness of legal framework on co-operation with Indonesia</u>

Apart from the MOU, was there any other legal basis permitting judicial co-operation between SCU and Jakarta?

Was there active co-operation between the Attorney-General's Chamber in Jakarta and the SCU in relation to witnesses eg was SCU requested to share witnesses' evidence or provide their statements to the AGO?

If there was assistance rendered to the AGO in relation to witnesses or other matter, what was the legal basis for that assistance if the MOU was never relied by both parties?

How did SCU manage to arrest and prosecute the sole Indonesian accused, Beny Ludji?

What is the Office of the GP's strategy to ensure that indictees at large in West Timor and Indonesia will be handed over for trial in Timor-Leste ? What measures have been adopted to ensure the assistance of Indonesia in relation to arresting indictees and obtaining evidence outside the jurisdiction?

What is expected of the international community in relation to ensuring co-operation between the Governments of Indonesia and Timor-Leste on the judicial process in Dili?

Was there an unwritten understanding or agreement with Indonesia that the Ad Hoc Human Rights Court would try Indonesia indictees whereas the SCU would only try East Timorese defendants?

Adequacy of legislation

Is the legal framework (eg UNTAET Regulations) adequate, sufficiently clear and comprehensive to enable the SCU to discharge its mandate?

Has there been any confusion or inconsistency arising out of the concurrent application of the UNTAET Regulations and Indonesian subsidiary laws?

Indictment and case theories

What is the main legal theory in relation to the events in East Timor in 1999?

Was there sufficient evidence to establish state policy or state involvement in the events of 1999? Please list some of the evidence available to the SCU in support of this element.

Investigations

What are the general qualifications and level of expertise of the international and local investigators?

What sort of training have investigators received?

Did the investigators receive adequate co-operation from the East Timorese government; the witnesses and the Indonesian authorities for access to documentary evidence and witnesses located outside the jurisdiction?

What were the major impediments and obstacles faced by the investigators in the course of discharging their duties?

Trial teams

How many prosecutors on average are assigned to a prosecuting team?

What are the general qualifications and level of expertise of the international and local prosecutors?

What are the specific problems faced by team members in the preparation of these cases eg language barrier, different legal background?

Please provide a staffing profile for some of the cases i.e. for each team, the number of prosecutors assigned (national, international, investigators, legal associates and other support staff)

Witnesses

How many witnesses did SCU interview for all the cases that have been investigated?

How many witnesses testified for the Prosecution on average in each of the case before the Special Panel?

What categories of witnesses were called by the Prosecution eg experts, corroborative witnesses, victims, insiders, indictees?

Were there adequate facilities and resources for witness protection, transport, accommodation and counselling?
What type of expert evidence was adduced by the Prosecution for the cases?

What were some of the concerns raised by witnesses who have co-operated with SCU and who have testified before the Special Panels?

Plea agreements

Is there an internal policy or guidelines on plea agreements?

How many plea agreements have been entered between SCU and the defendants?

Will plea agreements be implemented as part of SCU's closing down strategy?

The National indictment

Please advise on the progress made to issue a warrant of arrest for the defendants in this case.

What are the causes for the delay in issuing a warrant of arrest for the defendants in the National Indictment?

Does Office of the GP intend to pursue the National indictment against all defendants charged even after May 20?

What are the SCU/Office of the GP's view on and prosecution strategy for the defendants who have already been tried before the Ad Hoc Human Rights Court in Jakarta for essentially the same conduct?

What are some of the criteria or factors the Office of the GP have to take into consideration before deciding whether to pursue Indictments against high-level perpetrators?

Handover Procedures

Are there plans to review the outstanding indictments and refer serious crimes cases to the Ordinary Crimes Division?

What are the legislative and constitutional amendments that need to be resolved to effect the transfer?

Institutional capability after May 20

Please elaborate on the institutional capability or otherwise of the Office of the GP to take over all SCU cases after May 20.

Does the Office of the GP plan to retain internationals on its own budget after May 20?

What is the present state of funding (committed or pledged) from voluntary donations and from the national budget?

What are some of the more critical problems with the present structure and organisation of the SCU?

What are the areas of expertise that are under-resourced and would require more funding?

What are the SCU's expectations on the UN's role and commitment after May 20?

What is the projected work-plan and deadline for completion of trials *assuming* the present judicial structure is retained after May 20?

Statistics

Please provide key figures of SPSC cases of individuals publicly indicted since the inception of the Tribunal and accused who have appeared in proceedings before the Tribunal. Please provide case information sheet listing profile of accused, date of arrest, indictment's factual allegations, related charges and status of proceedings for each case.

Please provide complete and up to date statistics and update on staff strength for SCU and the Office of the PG.

Questionnaire for the Attorney General's Office (AGO), Indonesia

Adequacy of legislation

1. Do Act 26/2000 and Act 39/1999 offer adequate and effective investigative powers to AGO investigators?

2. Were there instances where investigations or further inquiry were obstructed due to lack of legislative powers?

3. Does the applicable legislation need to be amended to address any obstacles?

Relationship with Komnas HAM

4. Is there an effective division of responsibilities between the AGO and Komnas HAM at the inquiry and investigation phases?

5. Were there disputes or disagreements between the AGO and Komnas HAM on the division of investigative responsibilities?

6. Did the AGO carry out any follow-up investigations after submission of the KPP HAM Tim- Tim Report?

7. What was the scope of co-operation between the AGO and Komnas HAM at the investigation stage?

8. Was there any criticism of the KPP HAM Tim-Tim Report within the AGO and how was this addressed? Was Komnas HAM required to resubmit its findings under Art 20 of 26/2000?

9. Did Komnas Ham offer its views on the final Indictment prepared by AGO?

10. Did the AGO request the assistance of Komnas HAM investigators in the preparation of the trials before the *Ad Hoc* Human Rights Court?

11. Were there diverging legal theories and/or assessments of evidence between Komnas HAM and the AGO? If so, what were the reasons for this divergence?

12. Did the AGO face any legal, technical or practical difficulties in invoking Article 19(g) of Act 26/2000 or Article 89(3) of Act 39/1999?

13. Were there any other legal, technical or practical obstacles that need to be resolved (e.g. by way of legislative amendment)?

Structural and institutional issues

14. Please provide a description of the structure of the AGO, with an organizational diagram if available.

15. Please describe the procedure for selection, appointment, supervision and dismissal of *ad hoc* prosecutors for the prosecution of human rights violations.

16. Are any posts in the AGO held by incumbents of posts in other Government departments, or by military personnel?
17. Was the AGO given full access to military witnesses and documents in the course of its investigations?

Adequacy of resources and facilities

18. Were there adequate facilities for the protection of witnesses, their families and AGO investigators?

19. Were investigation and prosecution team adequately staffed?

20. Were investigators and prosecutors trained in investigating and prosecuting serious human rights violations and violations of international humanitarian law? Please provide concrete examples of the training provided.

21. Did the AGO have access to in-house legal advisers on international criminal law, international humanitarian law and/or serious violations of human rights? Please specify the number of such legal advisers available, and their expertise.

22. Was the AGO investigation sufficiently funded and was there a workable time-line?

23. Did the AGO have access to sufficient technical expertise and resources for the purposes of the investigation (e.g. forensic assistance?)

The KPP HAM Tim-Tim Report

24. What forms of evidence were gathered at the inquiry stage and made available to the AGO for its investigation (e.g. witness statements, forensic evidence)?

25. Did the KPP HAM Tim-Tim Report make preliminary findings about the reliability of the evidence or was this a responsibility of the AGO?

26. Was there evidence tending to establish elements of crimes such as the existence of a widespread or systematic attack directed against a civilian population?

27. Was there evidence tending to establish legal requirements of applicable modes of liability (e.g. planning, ordering, aiding and abetting, complicity) relevant to State actors, militia and/or other perpetrators?

28. Was this evidence sufficient for indictment purposes?

29. Was this evidence sufficient to satisfy all elements the crime of genocide or crimes against humanity?

30. Were all witnesses who gave statements to the KPP HAM Tim-Tim Inquiry willing to testify at trial? How did the AGO proceed in cases of witnesses who were unwilling to testify?

31. Were any witnesses who gave statements to the KPP HAM Tim-Tim Inquiry members of the TNI? How did KPP HAM Tim-Tim Report assess their evidence?

32. Did the AGO receive the co-operation of the TNI to interview witnesses and access documentary evidence?

33. Was the KPP HAM Tim-Tim Report considered to be a complete investigative, trial-ready report or understood by all parties to be a roadmap for the AGO to conduct its own, further investigations?

Further investigations by the AGO

34. Apart from the individuals indicted by the AGO, did follow-up investigations provide evidence linking the other suspects listed in the KPP HAM Tim-Tim Report to the crimes committed?

35. Did the AGO discover enough further evidence to discard KPP HAM's theory that State actors were involved in the crimes?

36. Based on the evidence available to the AGO, was the most reasonable inference that the violence in East Timor in 1999 occurred spontaneously, without organization and planning by the TNI?

37. Did the AGO question Major General Zakky Anwar Makarim regarding the allegations made against him in the KPP HAM Tim-Tim Report concerning his involvement with the militias?

Preparation of cases for trial

38. Did the AGO prosecution teams co-ordinate the legal theories to be presented in cases before the Ad Hoc Human Rights Court?

Questionnaire for Judges of the Ad Hoc Human Rights Court

Core achievements

1. Please provide feedback with substantiation on whether the judicial process of the Ad Hoc Human Rights Court have achieved the following:

   k) establishing the facts and an accurate historical record of the nature of the events surrounding the popular consultation in Timor-Leste in 1999 and adequate documentation of the diverse nature of the crimes committed in 1999;

   l) bringing justice to the victims of these crimes, providing them an opportunity to contribute to the process of establishing truth, *e.g* through witnesses statements and court testimony and acceptance of their evidence by the Ad Hoc Court;

   m) contributing to international humanitarian and international criminal law and setting legal and institutional precedents, if any;

   n) contributing to the restoration of peaceful and normal relations between peoples who were previously in conflict;

   o) strengthening the rule of law and respect for human rights in Indonesia.

Adequacy of legislation

2. Is the legal framework applicable to the Ad Hoc Courts (e.g. Act 2000/26, Act 1999/39, KUHAP) adequate, sufficiently clear and comprehensive to enable the Ad Hoc Court to discharge its mandate? Please describe any inconsistencies, limitations or other issues related to the legal framework that presented obstacles to the effective adjudication of cases of serious human rights violations.

3. Are the judges able to reconcile the existing national legislation, such as KUHAP and KUHP with Act 26/2000?

4. Do judges make reference to procedural laws of the international criminal tribunals such as the ICTY, the ICTR and the ICC? Could you please provide some examples of such references in the written Judgements or in your oral decisions?

5. Do judges make reference to substantive law and jurisprudence of the international criminal tribunals such as the ICTY, the ICTR and the ICC? Could you please provide some examples of such references in the written Judgements or in your oral decisions?

Fair trial rights

6. What are some of the areas of improvement in relation to preserving the right of an accused to a fair trial before the Ad Hoc Courts?

Rights of victims and witnesses

7. What are some of the areas of improvement in relation to preserving the rights of victims and witnesses before the Ad Hoc Courts, including their rights to dignity, protection and privacy?

Judicial function

8. Please describe the nature of interaction between career Judges and *ad hoc* Judges. Were there any challenges encountered in this regard?

9. Please explain how the independence and impartiality of career Judges are properly protected. Please explain if career Judges benefit from the necessary security protection, tenure, salary, and freedom from political interference to be able to carry out their work.

10. Please explain how the independence and impartiality of *ad hoc* Judges are properly protected. Please explain if *ad hoc* judges benefit from the necessary security protection, tenure, salary, and freedom from political interference to be able to carry out their work.

Judicial resources

11. Do Judges have sufficient access to research facilities, legal researchers and clerks to assist with the trial proceedings, decisions and judgements?

12. Apart from expert witnesses in a particular trial, do judges have access to specialised legal research and drafting support on issues of international humanitarian law, international criminal law and international human rights?

13. What are some of the more critical problems with the present structure and organisation of the Ad Hoc Court?

Indictments

14. Were the indictments sufficiently clear and precise in supporting each of the charges made? Could the indictments have been improved in any way? Were there particular legal issues which tended to require additional clarification by the prosecution?

15. Did the indictments consistently distinguish between the *crime* being charged (e.g. crimes against humanity, war crimes) and the applicable *mode of liability* or *form of participation* being charged (*e.g.* command responsibility, individual perpetration, complicity)?

16. Did the indictments present sufficient material facts to demonstrate the widespread and/or systematic nature of attacks directed against a civilian population?

17. Did any indictments need to be amended before or during trial, so far as you are aware?

Trial proceedings and process

18. Please identify current challenges faced by the Judges during trial proceedings (*e.g.* interpretation facilities, behaviour of public, time pressures)?

19. Do judges receive adequate assistance and co-operation from the Attorney General's Office and from defence counsel in the conduct of the trials?

20. What were some of the causes for delays and adjournments during trial proceedings?

Questionnaire for constitutional and legal expert (Timor–Leste)

Relationship between internal legal system and international law

1. Has section 9(1) of the Constitution ("The legal system of East Timor shall adopt the general or customary principles of international law") ever been invoked by a Court in order to directly apply rules of customary international law to internal legal proceedings?

2. Does section 9(1) of the Constitution imply that crimes under customary international law are directly punishable by the Courts, without the need for internal legislation?

3. Has section 9(3) of the Constitution ever been invoked by a Court in order to invalidate a rule contrary to a provision of an international treaty that applies to Timor-Leste?

4. If an amendment to the Constitution was required in order for Timor-Leste to fulfil its obligations under an international treaty, would Section 154(3) prevent such a treaty from coming into force for a period of 6 years from the entry into force of the present Constitution?

Applicability of previous law

5. Apart from those laws specified in section 3.2 of UNTAET Regulation 1999/1, have there been any rulings on the constitutional incompatibility of provisions in Indonesian laws, such as the Criminal Code (KUHP) and Code of Criminal Procedure (KUHAP), in accordance with section 165 of the Constitution?

6. Are there any areas of criminal law and procedure where Indonesian laws are referred to in order to address gaps in UNTAET Regulations or domestic legislation?

Adjudication of serious crimes

7. Has there been any significant challenge to the jurisdiction of the Special Panels for Serious Crimes on the basis of section 31(5) of the Constitution on non-retroactivity of criminal law?

8. Does section 163(1) of the Constitution, providing that the Special Panels for Serious Crimes "shall remain operational for the time deemed strictly necessary to conclude the cases under investigation", require that all outstanding indictments before the Special Panels either be prosecuted or formally withdrawn in order for the Special Panels to be legally dissolved?

9. Do the provisions of section 123(2) of the Constitution ("Courts of exception shall be prohibited and there shall be no special courts to judge certain categories of criminal offence") preclude the establishment of (a) an international tribunal or (b) a mixed

national-international tribunal to hear cases of crimes against humanity and other serious crimes, once the existing Special Panels conclude their work on existing cases under investigation?

10. Does the internal legal system distinguish between *extradition of nationals*, which is expressly prohibited under section 35(4) of the Constitution, and *transfer of nationals* to a competent international tribunal?

11. Has Timor-Leste drafted or passed legislation implementing the complementarity and co-operation aspects of the *Rome Statute of the International Criminal Court* (1998)?

12. Is there any incompatibility between section 31(2) of the Constitution ("No one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed" and section 12.1 of UNTAET Regulation 2000/15, which includes "crimes under international law" as punishable by the Special Panels for Serious Crimes?

Ne bis in idem

13. Is there any incompatibility between section 31(4) of the Constitution ("No one shall be tried and convicted for the same criminal offence more than once") and the exception to the *ne bis in idem* principle in section 11.3 of UNTAET Regulation 2000/15?

14. The ordinary meaning of section 11.3 of UNTAET Regulation 2000/15, read in the context of section 11.2, seems to suggest, by exclusion, that the phrase "another court" would include a court outside Timor-Leste and are not restricted to trials conducted in the courts within Timor-Leste. Is this interpretation consistent with the intent and purpose of the Constitution approved by the Constituent Assembly?

Amnesties

15. Has Draft Law 24/I/2a on amnesties and other clemency measures, approved by the Council of Ministers on 14 April 2004, been passed into law in Timor-Leste? If so, what categories of offences are subject to amnesty? Which body grants amnesties and on what conditions?

16. Is there any incompatibility between the competence of the National Parliament "to grant amnesty" in accordance with section 95(3)(g) of the Constitution and the provisions of the (Draft) Law on amnesties and other clemency measures?

17. Are there any constitutional or other internal legal barriers to granting amnesties specifically for *serious crimes*, including crimes against humanity?

Other matters

18. As far as you are able to advise, do any provisions of the Memorandum of Understanding between the Indonesia and UNTAET on Co-operation in Legal, Judicial and Human Rights-related Matters (April 2000) need to be incorporated into the internal legal system of Timor-Leste and Indonesia in order to be implemented?

19. If so, has legislation been passed or amended in accordance with section 14.2 of the Memorandum of Understanding?

20. What procedure is followed when an amendment to the Constitution is required?

Questionnaire for Komnas Ham on “Lapuran Penyelidikan Pelanggaran Hak Asasi Manusia in Timor-Timur”(KPP-Ham Final Inquiry Report)

Composition and legal training of KPP-Ham

1. Who made up the members of KPP-Ham? What were their professional qualifications?

2. Specifically, were members of either Komnas Ham or KPP-Ham body formally seconded or otherwise attached to another government or military post at any time?

3. Was KPP-Ham adequately staffed?

4. Was KPP-Ham sufficiently funded and was there a workable time-line?

5. Were there sufficient technical expertise and resources at KPP-Ham’s disposal (*e.g.* forensic assistance and other expert evidence)?

6. Were KPP-Ham members trained in investigating serious human rights violations and violations of international humanitarian law?

7. Did KPP-Ham members have a reasonably good understanding of the legal elements of genocide and crimes against humanity and the legal requirements of applicable modes of liability?

8. Did Komnas Ham have an in-house legal adviser on international criminal law and international humanitarian law? Did the legal adviser advise the KPP-Ham team in the course of its work?

Relationship with the Attorney General’s Office

9. Did KPP-Ham make findings on reliability or credibility of the evidence or were such findings within the purview of AGO?

10. Did Komnas Ham investigators assist in the preparation of the Ad Hoc Human Rights Court trials conducted in Jakarta?

11. Was there follow-up investigation conducted after submission of the KPP-Ham Final Inquiry Report to the Attorney-General’s Office (AGO) at AGO’s request?

12. What was the scope of co-operation between AG’s office and Komnas Ham at the AGO investigation stage?

13. Was the division of responsibilities between the inquiry and AGO investigation practicable?

14. Was there any criticism of the KPP-Ham report by the AGO and how was this addressed?

15. Was KPP-Ham required to resubmit its findings to the AGO under Art 20 of 26/2000*?

16. Did Komnas Ham offer its views on the final Indictment prepared by AGO on the 18 defendants?

17. Were there diverging legal theories and assessment of the evidence between Komnas Ham and the AGO, especially in relation to the involvement of the TNI or other government actors?

18. What were the reasons for this divergence?

19. Was the KPP-Ham Final Inquiry Report a complete investigation report and ready to be used for trial purposes or was it understood by both Komnas Ham and the AGO to be a preliminary inquiry report for AGO to conduct its own/further investigations?

Protection of victims, witnesses and investigators

20. Were there adequate facilities for protection of witnesses, their families and investigators in the course of the KPP-Ham inquiry?

The KPP-Ham inquiry

21. What sort of evidence was gathered during the KPP-Ham Inquiry? Did KPP-Ham manage to secure first-hand evidence, such as eye-witnesses testimony and relevant documentary evidence?

22. Were there instances where the inquiry or further inquiry by KPP-Ham was obstructed due to lack of legislative powers?

23. Were there attempts to interfere with or dictate the scope and the progress of KPP-Ham inquiry by individuals outside Komnas Ham?

24. Was there sufficient evidence gathered by the KPP-Ham inquiry tending to establish elements of crimes such as the presence of a widespread or systematic attack directed against a civilian population?

25. Was there evidence gathered by the KPP-Ham inquiry tending to establish legal requirements of applicable modes of liability (*e.g.* planning/ordering/aiding and abetting/complicity) between state actors such as TNI and militia / perpetrators? Was this evidence sufficient for indictment purposes by the AGO?

26. Was KPP-Ham given full access to military witnesses and documents?

27. Were all witnesses who gave statements willing to testify in court?

28. Did KPP-Ham interview any TNI witnesses? How did KPP-Ham assess or view their evidence?

29. Did KPP Ham receive the co-operation of TNI for witnesses' statements and documentary evidence?

30. Was there any difficulty in practice invoking Article 19(g) of Act 26/2000?*

* If there was a similar applicable provision under Act 39/1999 at the time of the KPP-Ham inquiry.

Other matters

31. Does Act 26/2000 and or 39/1999 offer adequate and effective investigative/inquiry powers to Komnas Ham investigators? Does Komnas Ham have any views on any aspects of the relevant legislation that needs to be amended?

32. Please elaborate on any other technical or practical obstacles that Komnas Ham finds should be addressed (*e.g.* by way of legislative amendments) in order for it to carry out its mandate more effectively.

Annex B

THE CATHOLIC CHURCH OF EAST TIMOR

POSITION ON JUSTICE FOR CRIMES AGAINST HUMANITY

Presented to the Commission of Experts appointed by the Secretary-General

The Catholic Church of East Timor welcomes the initiative of the Secretary General to appoint a Commission of Experts to evaluate the current processes both in East Timor and Indonesia and to recommend future measures.

We hope that the voice of the East Timorese people, who have suffered from impunity, would be heard.

The decision of political leaders to deny the Timorese people the right to justice reflects a disintegration of reason and the principles of the natural moral law that is necessary for the common good.

The Catholic doctrine is clear on the need for justice as the preservation of human dignity is rooted in truth and justice. Therefore democracy must be based on the true and solid foundation of non-negotiable ethical principles which underpins life in society.

East Timor is a nation with a Catholic majority that cannot support the Government's policy of impunity. Acceptance of this policy would undermine fundamental ethical requirements and principles of absolute value necessary for the dignity of the human person, democracy and progress of the people of East Timor.

It is the right and duty of Catholics and all citizens to seek the truth and to promote and defend justice. On this basis, the Catholic community will continue to insist on the moral and legal accountability of all individuals that committed human rights violations and crimes against humanity in East Timor from 1975 to 1999.

The Catholic community will not condone impunity for crimes against humanity. The victims who suffered these crimes, their families and the people in whose names such crimes are committed deserve nothing less.

International justice is now a crucial last resort to bring justice for the victims particularly as both the East Timorese and Indonesian Governments have agreed on a Truth and Friendship Commission that will not submit to a process for genuine justice and real accountability.

Recommendations

The Catholic Community requests the continued intervention of the United Nations to achieve justice for the people of East Timor for serious international human rights violations and humanitarian law, amounting to crimes under international law. As the Catholic Bishops of East Timor we recommend the following:

1. The Truth and Friendship Commission should not be treated as a substitute for criminal justice.

2. The United Nations and the International Community continue to pursue real accountability for crimes against humanity, war crimes and genocide committed in East Timor between 1975 and 1999. It is important that the international community recognizes the consequences of failing to address impunity. There will be no progress in the implementation of the rule of law and democracy in East Timor if impunity prevails.

3. The Security Council continues to uphold Resolution 1272 in response to the 1999 violence. The Security Council resolution 1272 condemned and called for the immediate end to all violence, and demanded that all those responsible for such violence be brought to justice.

4. Insist that Timorese political leaders honor the commitments made to the international community to bring the perpetrators to justice for the crimes that they had committed.

5. Insist that the Alkatiri Government respect the commitment made to the people through the Constitution for justice and observe Section 160 of the Constitution of RDTL that provides for criminal proceedings with the national or international courts for crimes considered against humanity or of war.

6. Insist that the RDTL Parliament demands international standards of justice and due process of law occurs to achieve justice and accountability for crimes committed in East Timor.

7. The United Nations promotes and urges the political leadership of East Timor to develop a constructive and values based relationship between East Timor and Indonesia to ensure a lasting reconciliation between the people of Indonesia and East Timor.

8. The United Nations ensure that reconciliation based on the interests of political leaders will not undermine human dignity and the need for justice.

9. The United Nations and the international community recognize the weaknesses of the judiciary system in East Timor. The judiciary lacks independence and has low levels of competence. Trials must comply with international human rights standards to ensure their legitimacy and credibility.

10. The United Nations take into consideration the fact that political interference is now a real issue and challenge for any national process. Due process of law may be undermined because of the political interests of political leaders. This factor intensifies the need for international justice for the East Timorese people.

Conclusion:

Based on the above factors the Catholic Church of East Timor urges the United Nations Secretary General to employ international justice mechanisms to bring perpetrators of crimes against humanity to account.

We hope that the cost factor and slow moving procedures encountered by international criminal tribunals in the past will not deter the Secretary General from recommending to the Security Council the appropriate international justice mechanism as the remedy necessary to ensure the preservation of human rights and to act as the alternative to impunity.

The Catholic Church of East Timor looks forward to hearing the Commission of Experts recommendation to the Secretary General.

The people of East Timor offer our prayers for the real discernment of this issue by the Security Council and for the members' proper execution of the United Nations Charter in the interests of human rights, justice and the common good.

SERVUS VERBI DOMINI + GABINETE DO PRELADO

D. Alberto Ricardo da Silva
Bishop of Dili

D. Basilio do Nascimento
Bishop of Baucau

East Timor
April 9, 2005

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Annex C

Annex C: Incremental transition process for new justice mechanism for Timor-Leste

I. Suggested planning phase
(two months, 20 May 2005-July 2005)

This would include the drafting and legislation of a package of laws establishing the authority and mandate of the Office of the Prosecutor to set up the specialised Unit.

II. Suggested development phase
(two months, July 2005-September 2005)

A team will be set up to develop the capacity to implement an institutional plan by recruitment for core positions and creating the management structure for the Office of the Prosecutor.

III. Suggested implementation phase
(twelve months, September 2005-September 2006)

The Office will exercise its functions in respect of serious crimes.

IV. Suggested management transition phase
(four months, September 2006-December 2006)

The international component will complete the transfer of responsibility for management of serious crimes investigations and prosecutions to domestic professionals.

This transfer will be affected over the course of 15 months from the commencement of serious crimes proceedings in September 2005.

V. Suggested international judges and prosecutors transition phase
(five months, January 2007-May 2007)

The composition of the Special Panels will change from two international judges and one national judge to one international judge and two national judges.

The Office of the Prosecutor will also gradually reduce the number of international staff.

VI. Suggested completion of transition phase
(two months, May 2007-July 2007)

The remaining international judges and prosecutors will leave at the beginning of this phase, leaving the Unit and Special Panels composed entirely of national professionals.

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Individuals and institutions

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The Legal Advisory Section of the Office of the Prosecutor,
International Criminal Court for its use of judicial database

Mr. Ian Martin, Former Special Representative of the Secretary-General, United Nations Assistance Mission in East Timor

Ms. Siri Frigaard, Former Deputy Prosecutor-General for Serious Crimes, Serious Crimes Unit

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